FILE COPY.

Office Supreme Court, U. S.
FILED.
APR 6 1907
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1906.

ADAMS EXPRESS COMPANY, - Plaintiff in Error,
v. Case No. 331.
COMMONWEALTH OF KY. - - - Defendant;
and
ADAMS EXPRESS COMPANY, - Plaintiff in Error,
v. Case No. 332.
COMMONWEALTH OF KY. - - - Defendant;
and
AMERICAN EXPRESS COMPANY, - Plaintiff in Error,
v. Case No. 583.
COMMONWEALTH OF KY. - - - Defendant.

Brief for Defendant in Error.

N. B. HAYS, Attorney General,
CHAS. H. MORRIS,
For Defendant in Error.

Geo. A. Lewis Publishing House Print, Frankfort, Ky.

Supreme Court of the United States

OCTOBER TERM, 1906.

ADAMS EXPRESS COMPANY, . . . Plaintiff in Error,

v. Case No. 331.

COMMONWEALTH OF KY. . . . . Defendant.

AND

ADAMS EXPRESS COMPANY, . . . Plaintiff in Error,

v. Case No. 332.

COMMONWEALTH OF KY. . . . . Defendant.

AND

AMERICAN EXPRESS COMPANY, . . Plaintiff in Error.

v. Case No. 583.

COMMONWEALTH OF KY. . . . . Defendant.

BRIEF FOR THE DEFENDANT IN ERROR.

CASE NO. 331.

On February 17, 1904, Adams Express Company was indicted by the grand jury of Laurel county, Ky., for

the unlawful sale of liquor in violation of the local option laws of Kentucky. Motion to quash the summons was made and overruled. A demurrer was filed to the indictment and overruled.

On the trial the jury returned a verdict of guilty, and fixed the fine at sixty ($60.00) dollars, on which judgment was duly rendered. Plaintiff in error reserved exceptions, and filed its motion and grounds for a new trial, which was overruled. An appeal was duly prosecuted to the Supreme Court of the State, where, on June 17, 1905, the same was affirmed.

A petition was then filed in said court for a rehearing, and on May 4th, 1906, it was overruled. It is now here on writ of error for review.

SYNOPSIS.

From the evidence it appears that a gallon of whisky was shipped by an unknown consignor to the prosecuting witness, George Meece, to East Bernstadt, Laurel county, Ky.; that said Meece had not ordered it, nor authorized anyone to do so for him; that the first information he had of its being in the express office was given to him by the agent of said company; that he informed the agent that he could not take it out then, but said to the agent, "if you will hold it till next Saturday, I will then come and get it." The agent agreed to hold it, and Meece went the next Saturday and paid the C. O. D. charges, $3.85, and the agent delivered it to him. The agent knew the package contained whisky or brandy, and admits that he had been delivering quite a number of similar packages under like circumstances. The plaintiff in error claims that

its holding of said whisky, the acceptance of the C. O. D. charges, and delivery of the whisky constituted a part of the alleged interstate transportation.

CASE NO. 332.

The evidence in case No. 332 is substantially the same as in case No. 331, with the additional facts, that the plaintiff in error has been shipping on an average of 50 such packages daily to persons who did not order them, for the past 14 years; that the instruction of the plaintiff in error to its agents is to hold such a package for two or three days, and if the party to whom it is consigned does not call for it within such time, then to notify such person of there being a package in the office for him. If he does not call for it from 30 to 60 days thereafter, he must return such package to the unknown consignor. The agent admits, however, that he never notified the supposed consignees. Plaintiff in error contends that its holding, delivery and acceptance of the C. O. D. charges form part of its alleged interstate transportation.

CASE NO. 583.

EVIDENCE.

Richard Graham, the party to whom the whisky was shipped, states that he did not order the package of whisky, nor did he authorize any one else to do so for him; and that he did not make or sign, or authorize any one else to make or sign, his name to the alleged order offered in evidence for said whisky. He says that he did not know that the package contained whisky until

he had opened it; that he then gave the agent a drink of said whisky. He states that he received it at Hodgenville, Kentucky, and it is shown that the local option laws of the State were, and are, in force there. It is plain from the evidence that this order was a forgery, and was made by the agents of whisky men who go into these local option districts and there procure the names of all men whom they may tempt to buy their whisky, by shipping them a package C. O. D. to their local express office, and thereby, under the protection of the interstate commerce clause, they and their willing allies, the express companies of the State, evade the local option laws thereof. If the appellant did not know, or could not have known by the exercise of reasonable diligence, the local option laws of the State were, by this trick, fraud and deception, evaded, and it accepted the C O. D. charges and delivered the package as a part of its interstate transportation, then it was not guilty.

The evidence was conflicting, and the court properly charged the jury that they should find the appellant in error not guilty, if they believed from the evidence that whisky had been shipped by appellant in error from Cincinnati, Ohio, and had been ordered by said Graham. But whether or not it had been ordered, or was shipped by appellant in error from Cincinnati, Ohio, and was, therefore, an interstate transaction, was a question of fact for the jury to find, and their finding is not subject to review.

The alleged order purports to have been made on March 21st, 1905. The whisky reached Hodgenville March 24th, and the agent mailed a notice to Graham

on March 27th, and it purports to have been delivered to Graham on March 29th, 1905. But Langley, the appellant's agent, swears that the book which he keeps, showing when such packages were received and delivered, shows that it was received at Hodgenville on April 17th, 1905, and delivered to Graham on April 18th. These facts, taken together, justify the conclusion that the whisky was shipped in March and held by the appellant in error until April 18th, before it was delivered to Graham.

We invite the court's attention to the facts in this case, as they must determine the guilt or innocence of the appellant. The Commonwealth contends that if the plaintiff in error held the said package and stored it in its warehouse, it did so as the agent of the whisky shipper, and especially when it had remained there longer than a reasonable time for its delivery to Graham, it ceased to be part of the interstate transportation, and under the Wilson law became a part of the mass of property in the State and subject to the police laws thereof. The facts in the two preceding cases and the discussion of the law applicable thereto have been gone over fully, and the same, we contend, applies to this case.

WILSON ACT—AUGUST 8, 1890.

United States Statutes 1901, page 3177.

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or *remaining therein for use, consumption, sale or storage therein,* shall, upon arrival in such State or Territory, be subject

to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt by reason of having been introduced in original packages or otherwise."

This act has been before this court for its construction and interpretation in the following cases:

Wilkerson v. Rahrer, 140 U. S., 545 (35 : 572.)

Scott v. Donald, 165 U. S., 58 (41 : 632-8.)

Rhodes v. Iowa, 170 U. S., 412 (42 : 1088.)

Vance v. Vandercook Co., 170 U. S., 438 (42 : 1100.)

American and Adams Express Co. v. Iowa, 196 U. S., 133-147 (49 : 417-424.)

Foppiano v. Speed, 199 U. S., 501 (50 : 288.)

Heymann v. Southern R. R. Co., Oct. Term, 1906, Advance Sheets, Jannuary 15, 1907, page 105.

In the Rahrer case the Wilson act was held to be constitutional, and it was held that Congress had the power to provide that the articles of interstate commerce named in said act should become subject to State laws earlier than other articles of interstate commerce.

In the Scott case this court held that a State law of South Carolina was repugnant to the Constitution of the United States because it discriminated in favor of domestic and against foreign wines, &c.

The Court said:

"It is sufficient for the present case to hold, as we do, that when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from, other

States; that such legislation is void as a hinderance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States."

In the Rhodes case the box of whisky had been shipped from Dallas, Illinois, to Brighton, Iowa. On its arrival at Brighton it was placed by the trainmen on the station platform. Shortly afterwards Rhodes, the the agent, moved it from the platform into the freight house, a distance of about 6 feet. *In about an hour thereafter* the box was seized by a constable under a search warrant, on the ground it contained whisky. At the time of the seizure the freight charge due to the railroad was unpaid. Under the above facts the court said:

"We think that, interpreting the statute by the light of all its povisions, it was not intended to, and did not, cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

In the Vandercook Co. case this court held that a State law which undertook to regulate the constitutional right of a citizen of one State to contract with a citizen of another State for an article of commerce, and to have it shipped to him for his individual use, was repugnant to the Constitution, and void; but that since the adoption of the Wilson act the Vandercook Co. could not ship its wines from the State of California to its agent in South Carolina, and through him sell the same in original packages, or otherwise, as in-

terstate commerce when the same was prohibited by the laws of said State.

In the American Express Company's case four boxes of whisky were shipped C. O. D. by it from Rock Island, Ill., on March 29th, 1900, to Tama, Iowa. They reached Tama on March 31st, *and on that day were seized in the hands of the express agent.* The express company set up that it had received the packages, *not for sale in Iowa,* but for *carriage and delivery to the consignees.*

> "An agreed statement of facts was stipulated, admitting the receipt, carriage and the holding of the packages as above stated."

The court reaffirmed the Rhodes case, and said:

> "It was, however, decided that the Wilson act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one State to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages."

After referring to the cases of Caldwell v. North Carolina, 187 U. S., 622, and Norfolk & W. R. Co. v. Sims, 191 U. S., 441, as to when the title of such property passes as between consignor and consignee, the court continued:

> "The controlling force of the two cases last reviewed upon this becomes doubly manifest when it is borne in mind that the power of the States to levy general and undiscriminating taxes on mer-

chandise shipped from one State into another may attach to such merchandise before sale in the original package, when the merchandise has become at rest within the State, and, therefore, enjoys the protection of its laws, and this upon the well-recognized distinction that the movement of merchandise from State to State, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution."

In the Adams Express Company case it was charged with maintaining a nuisance in violation of a section of the Code of Iowa, and for keeping intoxicating liquors with the intent unlawfully to sell them within the State, contrary to an Iowa statute. On a plea of not guilty by said company, the following stipulation was made:

"*An agreed statement of facts was stipulated from which it appears that the Adams Express Company was a common carrier, engaged in the express business between the States of Missouri and Iowa; that it received the liquor in question at St. Joseph, Missouri, to be carried to St. Charles, Iowa, there to be delivered to the consignees, whose names were upon the packages, and that each and all were marked C. O. D.—meaning that they were not to be delivered by the express company to the consignees until the purchase price and the express charges were paid to the agent of the express company. It was further recited in the statement of facts that the only connection of the Adams Express Company with the transaction or transactions in relation to said liquors was as a common carrier,* having received the same in Missouri for carriage to the consignees at St. Charles, Iowa."

This court, on the authority of the American Express Company case, held the conviction erroneous.

In the Foppiano case the plaintiff in error was plying the ferryboat, Chas. H. Organ, between Memphis, Tenn., and a point in Arkansas, and while so doing operated a bar at which he sold liquors without having procured license as required under the laws of Tennessee. He contended that he was not required to take out license, first, because he was engaged in interstate commerce; and, second, because the ferry company being an Arkansas corporation, he was within the jurisdiction of that State when he was on the boat and sold the whisky.

The court said:

> "When the ferryboat entered the boundaries of the State of Tennessee, and fastened up at the wharf in Memphis, and the plaintiff in error then sold liquors to customers as they asked for them, he became subject to the police laws of that State regarding the sale of intoxicating liquors."

In the case of Heymann v. Southern R. Co., decided at the October Term, 1906, Advance Sheets January 15, 1907, page 104, the court, after reviewing all these cases and reaffirming the construction it had placed on the Wilson act, *stated the facts which differentiate the cases at bar from any case which it has decided.* Here the court said:

> "Of course, we are not called upon in this case, and do not decide, *if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination,* and, *after notice and full opportunity to receive them,* ARE DESIGNEDLY LEFT IN THE HANDS OF THE CARRIER FOR

AN UNREASONABLE TIME, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, *the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered.* We say we are not called upon to consider this question, for the reason that no facts are shown by the record justifying passing on such a proposition."

INTERSTATE COMMERCE.

The construction of article 1, section 8, sub-section 3 of the Federal Constitution by this court may be summarily stated:

First. The transportation of articles of commerce from one State to another is interstate commerce.

Second. That, in the absence of legislation by Congress, interstate commerce among the States shall be absolutely free from, and untrammelled by, State interference.

Third. That articles of commerce, other than whisky, shipped from one State into another in original packages remain, under the protection of the interstate commerce clause of the Federal Constitution and free from State regulation for such reasonable time as may, in the usual course of business, be required for delivery to and sale by the consignee.

Fourth. That any original package of whisky shipped from one State into another State, since the passage of the Wilson act, remains under the protection of the interstate commerce clause of the Federal Constitution and free from State regulation, for such time as may be reasonably necessary in the usual course of business for it to be delivered to the consignee.

Fifth. It is also conceded by the Commonwealth that, when a consignment of interstate commerce has been made from one State into another State, that, after it has reached its destination and come to rest, it is still under the protection of the interstate commerce clause for such reasonable time as may be necessary for the consignee to receive it, whether shipped in original packages or otherwise; but that it thereafter becomes subject to the jurisdiction of the laws of the State, and must be considered as mingled with the property of such State.

Sixth. That an interstate commerce transaction is protected from State interference, not only by the principle of freedom of commerce between the States, but by the inherent right of a citizen of one State to freely contract with a citizen of another State for an article of commerce, and to have it delivered to him as a part of said interstate transaction without State interference.

Seventh. The right to ship articles of commerce from one State into another, and there sell the same, while in the original packages, without State interference, is well settled; but this right does not apply to whisky as an article of interstate commerce. The Wilson act so regulated it as an article of interstate commerce as to make it on its arrival in a State become subject to the laws of such State, whether introduced in original packages or otherwise. **If after it has arrived within any State it remains therein for use, consumption, sale or storage, it becomes subject to the operation of the laws of such State, enacted in the exercise of the police powers.** The Commonwealth contends that the evidence in the

cases at bar shows that said packages had arrived within the State before the C. O. D. charges were accepted or the deliveries by the plaintiffs in error were made; and **that plaintiff held the same for sale, and had the same stored, within the meaning of the Wilson act,** and that plaintiff did so as the agent of the consignors or whisky dealers who shipped the same; and that appellant knew, or could have known by the exercise of reasonable diligence, that said shipments were frauds, deceptions and tricks to evade the local option laws of Kentucky.

But this case does not come within any of these concessions. The shipment of whisky was sent to the consignee without an order or request for it by him. No contract, expressed or implied, existed between the consignor and consignee for said shipment. There was no interstate commerce transaction between them. The consignee did not know who was the consignor, or from where it was shipped.

In this case the prosecuting witness, George Meece, was asked (R., 11) following question:

"28. How did you find out that whisky was there?"

"A. The first I knowed it was there, I went in with my brother, and he asked if there was a package there for him, and while looking over the books, Newland (agent of appellant) said there was one there for George Meece. I told him I couldn't take it then, but would take it next Saturday, which I did."

This is the only contract Meece had with any one for

the whisky. It was between the agent of plaintiff in error and said Meece, and not between Meece and the owner or consignor of the whisky. This whisky was the property of the consignor's, and the plaintiff in error held it as his agent. When the plaintiff in error agreed with Meece to hold the whisky for the ensuing week and until he could take it, and did hold it for him and at the end of said time accepted the pay and delivered him the whisky, it was certainly a sale of the whisky at East Bernstadt, under the local option laws of Kentucky, and not elsewhere.

After this agreement was made the plaintiff in error held it as a warehouseman, and if it ever had the semblance of an interstate commerce package, it then ceased to be such. This agreement between the plaintiff in error and Meece was a constructive delivery of said whisky to said Meece; and it had fully arrived in said State within the meaning of the Wilson act, and during the time plaintiff in error held it it was stored for sale within the meaning of said act. Hence on these undisputed facts the trial court did not err in refusing to instruct the jury as to an article of interstate commerce.

On April 28, 1890, the case of Leisy v. Hardin, 135 U. S., 100 (34 : 129), was decided. It was held in the opinion of the court that the right of transportation of an article of commerce from one State to another *included the right of the consignee to sell it in unbroken packages at the place where the transportation terminates.* This enabled the whisky men, through the channel of interstate commerce, to evade the local option laws of Iowa.

On August 8, 1890, Congress passed the Wilson act,

and in the case of Rhodes v. Iowa, 170 U. S., 412 (42 : 1089), the court, in speaking of its purpose, said:

> "On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which was its purpose to frustrate."

The appellant was indicted and convicted, not for the transportatior of an article of commerce, either State or interstate, but for the unlawful sale of whisky in a local option district.

The transportation of whisky from a point without to a point within Kentucky, where the local option law is in force; or from one point within the State where the sale is permitted to another point therein where the sale is prohibited, is no offense under the local option laws of Kentucky.

James v. Commonwealth, 102 Ky., 108.

Doores v. Commonwealth, 28 Ky. L. R., 192.

McDermott v. Commonwealth, 29 Ky. Law Rep., 750.

Adams Express Co. v. Commonwealth, 29 Ky. Law Rep., 904. = Crigler S. Com. 27 Ky. Law Rep. 918.

It is the payment of the money, or the delivery of a C. O. D. package of whisky shipped from a point within the State where the sale is permitted, to another point therein where the sale is prohibited; or the payment of the money for an interstate commerce C. O. D. package, at a point within the State where the sale is prohibited, which constitutes the offense embraced by sub-section 4 of section 2557b, Kentucky Statutes.

Newland was the express agent. He testified in part as follows: (R., 13 and 14.)

"19. How many such packages had you seen there in the depot prior to the date on which you delivered to George Meece the package he got?"

"A. I don't know."

"20. Well, about how many?"

"A. About seventy-five, or something like that."

"21. Did you ever see any of these packages taken out of the depot office and opened?"

"A. I have seen packages like that after they were opened. I never saw them opened."

"22. What was in *them* packages, like the one you delivered to George Meece, that you say you saw after it had been opened?"

"A. Four quart bottles."

"23. What was contained in these bottles?"

"A. I don't know."

"24. Was there anything in them?"

"A. Yes, there was something in them."

"25. Were these bottles labeled?"

"A. Yes, sir."

"26. What was on the label?"

"A. Some were labeled 'whisky,' and some 'brandy.'"

"32. Is it not a fact that you were aware, or at least fully satisfied, that these packages of which you speak of having been shipped there to that office, prior to the date on which you delivered that shipment to Mr. Meece, contained whisky or brandy?"

"A. I was satisfied that was what they contained."

"33. Wasn't you fully satisfied, also, that the shipment you delivered to George Meece was a package of whisky or brandy?"

"A. I thought it was; yes, sir."

(R., 19.)

"66. When did you receive that package at East Bernstadt?"

"A. I could not say the date, so many of them come. It might have been in November or December. I think I delivered it in December."

"67. You delivered it, you say, in December?"

"A. I think it was."

"68. How much did you collect on that package?"

"A. Three dollars and eighty-five cents."

"69. Did you pay any of that money to the Adams Express Company?"

"A. No, sir."

"70. I will ask you if it is not a fact that every cent that you received from Mr. Meece on that package was put up in a sealed envelope and sent to Crigler & Crigler, Cincinnati, Ohio?"

"A, Yes, sir, it was."

"73. I will ask you if it is not a fact that before this package was received by the Adams Express Company, that the charges for transporting same were paid to the Adams Express Company in Cincinnati, Ohio, for the transportation of this package from Crigler & Crigler to deliver it to East Bernstadt, to George Meece?"

"A. Yes, sir, it was prepaid."

(R., 21.)

"92. About what was the express charges on the express package which Mr. Meece received at East Bernstadt?"

"A. Not any charges on it there, it was prepaid. It was about fifty-cents, I think."

95. Do you know who prepaid the charges on that particular package?"

"A. The shipper, I suppose."

"96. Does the Adams Express Company keep a record of the charges on express packages?"

"A. Yes, sir."

"97. Did you keep one for the company in East

Bernstadt, and did you do so at the time this shipment was delivered to Mr. Meece?"

"A. Yes, sir."

In the case of Missouri, Kansas and Texas Railway Company v. Hober, 169 U. S., 613 (42 : 878,) it is held that U. S. Revised Statute, section 5258, which authorizes railroads to carry freight and property from one State to another, does not authorize them to carry into a State, in violation of State law, cattle known, or which by due diligence may be known, to be in such condition as to impart disease to the domestic cattle of such State. Here the court said:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * *

"The States might, by police regulations, protect their people against the introduction, within their respective limits, of infected merchandise, and by like regulations exclude from their midst not only convicts, paupers, idiots, lunatics and persons likely to become a public charge, but animals having contagious diseases." * * * And "a statute prescribing a rule of civil conduct, that a person or corporation bringing into the State cattle that are known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes."

> The court here instructed the jury that before they could find the defendant railroad company guilty, "they must believe that the officers, employes or agents of the railway company defendant had knowledge that such Texas cattle transported by it to this State (Kansas) were liable to impart such disease to the native cattle of this State (Kansas), or that they ought, by the exercise of diligence and care, to have known of the dangerous character of these cattle, and that they would, or were liable to, impart such disease to the native cattle of this State (Kansas)."

This instruction was approved.

In case No. 331 at bar, the express agent not only, by the exercise of diligence and care, could have known that these packages contained liquor, which was prohibited to be sold in said district, but he positively states that he had seen a number of like packages opened, and that they contained four quarts of whisky or brandy, and that at the time he agreed with Meece to hold it until Saturday, and at the time he delivered it to him, he believed that said package contained whisky or brandy. Hence, under the above authority, the plaintiff in error should be held liable for knowningly holding and delivering said liquor, and accepting the charges therefor, which constitutes a sale under the laws of Kentucky.

CASE NO. 332—OCTOBER TERM, 1906.

From the evidence in this case it appears that the plaintiff in error had, within twelve months before the finding of the indictment, both delivered and accepted the C. O. D. charges on some 20 packages of whisky from the

prosecuting witness, J. D. Main; that he had not ordered any of them directly or indirectly; nor had he requested, directly or indirectly, the plaintiff in error to transport them for him. The plaintiff in error had returned some packages which Main had refused to take out of its office. There was no contract of consignment. Hence no interstate commerce transaction existed as between a consignor and consignee.

The evidence further shows that, notwithstanding the local option law was in force at Barbourville, the agent, Owens, usually has 50 of these packages stored in the express office for consignees who have never ordered them; that the appellant's instruction to its agent is to give such consignee notice, if the package is not called for in two or three days; and if not called for from 30 to 60 days, then to return it to the consignor; that this custom has been carried on by appellant for 14 years, and is still being kept up. The agent says he never notifies the consignee, and assigns as a reason that such packages come so fast and in such numbers that he has not time to do so.

J. D. Main in part testified as follows:

"Q. From what parties did you get the whisky?"

"A. I think the brand of the whisky was called the White Oak, and there were envelopes in the box giving the number of a lock box at Cincinnati; they came there addressed to me, with $3.85 charges."

"Q. That was the C. O. D. charges?"

"A. Yes, sir."

"Q. You paid that to the agent at the Barbourlivle depot?"

"A. Yes, sir."

* * * * * * * * * * *

"Q. Did you order the whisky?"

"A. No, sir."

"Q. Did you know it was going to be shipped to you?"

"A. I did not."

"Q. Did you authorize any company to ship the whisky there to you?"

"A. Did not."

"Q. Did the Adams Express Company have any authority from you, in any way, to bring the whisky there?"

"A. No, did not."

* * * * * * * * * * *

"Q. Where did you get the packages; from what part of the depot?"

"A. There was a private room in the express office in the depot."

"Q. Got it out of the express office?"

"A. Yes, sir."

* * * * * * * * * * *

"Q. Did you have any talk with Mr. Owens about it?"

"A. Yes, sir."

"Q. What did you say about it?"

"A. The only conversation I remember was that he would not deliver the whisky to any party that it was not addressed to. I did not know who shipped the whisky."

"Q. At the time you got this package out of the depot and turned the money over to Mr. Owens, were there any other packages of whisky there in the express office?"

"A. Yes, sir."

"Q. How many did you see?"

"A. I saw a good many stacked up there."

* * * * * * * * * * *

"Q. Do you know from where the whisky was shipped except what you have stated?"

"A. Nothing, only what I have stated. I don't know anything about where it was shipped from."

"Q. Did you get any information from Mr. Owens as to how the packages came into the depot?"

"A. He said they came by express, and the express charges must be paid."

"Q. Was there anything on the bottle, any brand or anything on the bottle, by which you could tell from where the bottles came?"

"A. I don't remember exactly how the bottles read; there came different boxes and different brands, but it seems to me like it was the White Oak Distillery Co., Covington, Kentucky."

* * * * * * * * * * *

"Q. Did you ever order any boxes of whisky from those people?"

"A. I did not."

"Q. Did you ever authorize any one to do it?"

"A. I did not."

"19 Q. How did you get information that the whisky was there?"

"A. Very often I would send by some one to know if it was there, and then I would go and get it. I notified them once, and also got Mr. Jesse Tuggle to notify them not to ship any more."

"Q. After you found out the whisky was there, on various occasions you would go and take it out?"

"A. Yes, and pay for it. Me and Tom Wilson and Tom Gilbert notified the parties not to ship any more in my name."

"Q. Did you ever refuse a box of whisky that was shipped to you?"

"A. I don't know how many was shipped to me; I have taken out several boxes."

"Q. About how many did you take out?"

"A. I don't know; I may have paid out twenty boxes. I don't remember how many, in the latter part of the year 1904 and the earlier part of the year 1905."

* * * * * * * * * * *

"Q. You paid him ten cents for delivering packages from the depot?"

"A. Yes; $3.85 was what I paid at the depot, and $3.95 is what I paid him."

"Q. Do you mean to say that you were buying this from the drayman?"

"A. No, sir."

"Q. You mean to say you were buying it from the agent?"

"A. No, sir."

"Q. What do you mean?"

"A. I mean that I paid the required charges as shown on the boxes."

* * * * * * * * * * *

"Q. Did you ever order a box returned?"

"A. I notified the company not to ship any more to me."

"Q. Did you ever order the agent there to return a box that was shipped to you?"

"A. It seems like I have, probably two years ago."

"Q. Have you in the last six months?"

"A. No, I think not."

"Q. In the last twelve months?"

"A. I will not be positive about that; I know that I never ordered the boxes from either of those companies; it is inferior whisky."

* * * * * * * * * * *

(Judge.) "You have some theory about how this whisky came to be sent you?"

"A. I have not the least idea. I have heard that there was some fellows around here, especially one of the Wests, who would get these names and send them in there. Charley Tinsley told me that this fellow got $86.00 on boxes he had sent here."

"Q. What West is that?"

"A. Some call him Charley Atkins, and some West; that is the way I understood the whisky was

shipped here by some fellow sending off the names; all I know about that is that I have heard it."

* * * * * * * * * * *

J. A. Owens testified as follows:

"Q. When was the first knowledge received by you that a C. O. D. package was in the care and custody of the Adams Express Company to be delivered to him?"

"A. When the box was put off of the train at Barbourville."

"Q. Did you notify Mr. Main of the receipt of that package?"

"A. I don't believe I have; I don't believe I ever notified him."

"Q. What is your custom with reference to notifying people about packages?"

"A. It is the rule of the company to notify the people in two or three days."

"Q. Do you always do that?"

"A. Not always; the business is so heavy I have not time generally."

"Q. Did Mr. Main come and receive these paskages?"

"A. Yes; he received some himself, and some were sent down town to him."

"Q. How many packages did Mr. Main receive?"

"A. I don't know."

"Q. About how many?"

"A. I don't know; I suppose he got ten or fifteen boxes."

"Q. Did you ever deliver to Mr. Main any whisky which was not shipped to him?"

"A. No, I did not."

"Q. Where was this whisky which you delivered to him billed from?"

"A. Cincinnati."

"Q. Do you know from whom that whisky was received?"

"A. No, I do not; only from the C. O. D. labels."

"29 Q. Now explain to the court how that whisky was billed, what information you received from the weigh bill, from whom it is received, and to whom the money goes?"

"A. The boxes come in with the express weight bill telling what amount was to be paid, from Cincinnati, Ohio, to Barbourville, Kentucky, and with that is the C. O. D. wrapper which the money goes back in; the wrapper in which we return the money after the package is delivered goes to the distillery, or the agent for the distillery."

* * * * * * * * * * *

"Q. You don't know where the whisky was manufactured, or where it was shipped from, except from the C. O. D. packages by which you returned?"

"A. I know the whisky was shipped from Cincinnati to me, and that is where I returned the money."

"Q. You don't know whether it was manufactured in Covington or some point in Kentucky and sent to Cincinnati and shipped back in this State?"

"A. No, sir."

* * * * * * * * * * *

"Q. You don't know how they happened to be sending the whisky to him without an order?"

"A. No, I do not."

"Q. About how many packages such as you delivered to him did you have in the depot at any one time during the year next before the December term of this court, 1904?"

"A. We had several; as high as fifty at a time."

"Q. How long has this whisky package business been carried on by the Adams Express Company through the depot here at Barbourville?"

"A. As long as I have lived here—14 years."

"Q. Is it yet being carried on by the company?"

"A. Yes, sir."

"Q. To how many different parties would there be packages of this whisky in the depot at one time?"

"A. There would be quite a number sometimes."

"Q. I understood you to say that you did not notify the parties of the package being there?"

"A. I don't remember notifying them of the whisky packages; they come in so fast I cannot notify them."

"Q. Such an extensive business?"

"A. Yes, sir."

(Judge.) "Is this delivery still going on?"

"A. Yes, sir."

"Q. Still coming in?"

"A. Yes, sir."

"Q. About how many C. O. D. packages are there in the depot at this time similar to what Mr. Main speaks of?"

"A. Ten or twelve, I believe."

* * * * * * * * * * *

"Q. Have you not been delivering this whisky regularly for the 14 years that you have been there?"

"A. Yes, sir."

"Q. It has been going on from day to day and week to week?"

"A. Yes, sir."

"Q. And in quantities less than five gallons?"

"A. Yes, sometimes."

"Q. Mostly in gallon boxes, such as Mr. Main speaks of?"

"A. Yes, sir."

"Q. The express company's agent receives the money and returns it to the shipper?"

"A. Yes, sir."

* * * * * * * * * * *

"Q. Did you ever return any packages addressed to J. D. Main?"

"A. I believe I have."

"Q. Since when?"

"A. I returned some a week or so ago, a package that remains on hand thirty days we return them."

* * * * * * * * * * *

The Commonwealth contends that, from these facts, the plaintiff in error knew that this whisky had not been ordered; that it knowingly acted as the agent of the lock-box consignor in holding these packages for 30 and 60 days, and then in returning such as were not called for; it acted as the agent of such consignor in the delivery and acceptance of the C. O. D. packages, and that it is subject to the same liability which such consignor would have been, if he had in person brought these packages from Ohio into the local option districts of Kentucky, and then sold them.

The case of Vance v. W. A. Vandercook Co., 170 U. S., 440 (42 : 1101), is in point.

The defendant in error had shipped its wines in original packages to its agent in South Carolina, to store and warehouse in said State, and then sell in the original packages as transported; and had also shipped its wine to individuals who had ordered it for their own use. In passing on the questions raised and construing the law of South Carolina, the court in reversing in part and affirming in part the opinion of the lower court, said:

> "It follows from the foregoing that the decree below rendered was well founded in so far as it restrained the defendants from seizing the property shipped into the State of South Carolina from the

State of California by the complainant for the residents of the State of South Carolina on the orders of such residents for their own use, because said shipments had not been made in compliance with the regulations of the law of South Carolina. *But it further follows that the decree below was wrong in so far as it restrained the State officers from levying upon the property of the complainant shipped into the State to agents of complainant for the purpose of being stored and sold therein in original packages, and from interfering with such sales.*"

Foppiano v. Speed, 199 U. S., 501 (50 : 288), to the same effect.

The rule that the plaintiff in error was the agent of the supposed consignee will not apply, because the plaintiff in error admits that it returned these packages if not called for at the end of 60 days. Now, this shows that the plaintiff in error and this lock-box consignor had some sort of an arrangement by which it was to hold them; and if not accepted and taken out by the consignee, then to return to the consignor. Hence it knew that these packages had not been sold, and that it was to store and warehouse them for sale for said consignor within the meaning of the Wilson act, and when it thereafter delivered or accepted the C. O. D. charges it violated the prohibition law of Kentucky.

CONSTRUCTIVELY DELIVERED.

It is the contention of the State that, when in case No. 331, the agent of plaintiff in error notified the supposed consignee, Meece, that this package which the agent knew was a package of whisky was there for him, and said agent and Meece then made the agreement whereby the plaintiff in error was to hold it till the next Saturday,

and did hold it, said packages was then constructively delivered to said Meece, and it was then stored for sale by the plaintiff in error within the meaning of the Wilson act; and after the package in case No. 332 had reached destination and been placed in warehouse of plaintiff in error under the instruction to its agent to hold same for 30 or 60 days, and if not sooner called for and accepted, then to be returned to consignor, it was then stored for sale within the meaning of said Wilson act; and the transportation of said packages had ceased to be an act of interstate commerce, and both were exempt from the protection of the interstate commerce clause.

In the case of Heymann v. Southern R. R. Co., decided at the present term, Advance Sheets No. 4, page 107, after reviewing the decisions that have construed the Wilson act, and especially the meaning of the word "arrival," the court said:

> "Of course, we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered."

When nothing remains to be done by the carrier to complete its contract of transportation but to deliver the goods to the owner or consignee, then after a reasonable time to remove the goods in the usual course of business has expired, the goods are constructively delivered

and the transportation is ended, and the transportation having ended, they cease to be under the protection of interstate commerce. If the carrier still holds them, it is as a warehouseman.

Gregg v. Illinois Central Railroad Co., 37 Am. St. Rep., 238.

THE PLACE OF DELIVERY.

When no designated place of delivery is shown, then the carrier's office, or the station where the transportation reaches its destination, is the place of delivery.

Gregg v. Illinois Central Railroad Co., 37 Am. St. Rep., 238.

Marshall v. American Express Co., 73 Am. Dec., 386.

Cavallaro v. Texas, et al., Ry. Co., 52 Am. St. Rep., 94.

Bullard v. American Express Co., 61 Am. St. Rep., 358.

Hutchinson on Carriers, section 379, &c.

When a consignor ships by express, he undertakes as part of his contract that there will be a consignee at the proper place and at the proper time to receive the consignment; and in default thereof the express company undertakes to notify the consignee, or if the consignee refuses to accept and pay for such consignment as in case No. 331, said company will notify the consignor. The course of business in the cases at bar shows that it was not required by its contract of transportation to deliver said packages, but it instructed its agents, if the packages were not called for in two or three days, to notify the supposed consignee, and if he did not then call for them, to still hold them from 30 to 60 days; and if he had not called for them, to return them to the consignor. This

shows an arrangement between the plaintiff in error and the consignor which is unusual, and that the plaintiff in error was acting as the agent of the consignor, and that it considered the consignor the owner of said packages.

Marshall v. American Express Company, 73 Am. Dec., 381.

American Express Company v. Hockett, 95 Am. Dec., 691.

The Southern Express Company v. Dixon, 94 U. S., 549 (24 : 285).

In the last case cited the court said:

> **"We think the rule is that, where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated."**

PLAINTIFF IN ERROR HELD SAID PACKAGE AS A WAREHOUSEMAN.

After the agreement by Newland, agent of plaintiff in error with Meece that he would hold said package in case No. 331, until the following Saturday to enable him to take it out, said package was stored for sale within the meaning of the Wilson act; and after package in case No. 332 had reached its destination, and a reasonable time had expired in the usual course of business for its delivery, and it was still held by the appellant, it then ceased to be a package of interstate commerce, if it was ever such, and the appellant held it as a warehouseman.

Hutchinson on Carriers, 2d edition, section 356:

"It, therefore, frequently becomes a question of importance as well as of difficulty to determine when and under what circumstances the relation of carrier to the goods has ceased and their custody has become a mere bailment. It may be stated as a general proposition that when the carrier has done all that the law requires of him towards accomplishing a delivery, and from any cause fails to effect it, and the goods are of necessity continued in his possession, he from that time becomes responsible only as a depositary. * * *

"§ 376. *What is Reasonable Time for Removal*—What length of time will be considered reasonable for the removal of the goods, at the expiration of which the carrier will be regarded as holding them as warehouseman, when such reasonable time is allowed the consignee, it is said, can not be determined by any fixed or definite rule, but must depend in a great measure upon the circumstances of each case. When the facts are agreed upon or undisputed, it becomes a question to be determined by the court as one of law; but where they are disputed and unsettled, the question must be submitted to a jury."

The facts that this package, after Meece was notified it was in the express office, was by agreement stored and held for him by the plaintiff in error, are not disputed. Whether or not plaintiff in error was holding it as carrier or warehouseman when it was delivered was a question to be determined by the court as one of law.

"§ 383. It has been frequently determined that if the express carrier tender the goods to the consignee, and they are refused, the carrier will from that time hold them in the character of warehouseman. * * *

"§ 385. But it has been held that if the carrier is

instructed not to deliver the goods until they are paid for, and the consignee, instead of refusing to take them, promises to pay for and take them within a few days, and requests the carrier to keep them for him until he is ready to pay for them, the carrier becomes a warehouseman of the goods; and if they are destroyed while so held, without any fault or negligence of his, he will not be liable, although he has given no notice of the fact to the consignor."

The time when an article of interstate commerce shipped into a State ceases to be such may differ in some instances, but all will agree that there comes a time when it ceases to be such and becomes subject to the jurisdiction of State laws. The question then arises, how long can a common carrier hold packages of whisky which are shipped into a prohibited territory before such packages are subject to the laws of the State? Since the Wilson act, it becomes mingled in the common mass of property of the State as soon as it arrives within the State. Then when does it arrive within the State and become stripped of the protection of interstate commerce? It is the contention of the Commonwealth that when such packages have reached their destination and there has been reasonable time for the delivery thereof in the usual course of business, it then becomes a part of the mass of the property of the State, and subject to its laws.

Wald & Co. v. Louisville, Evansville & St. Louis R. Co., 92 Ky., 645.

Ray on Negligence of Imposed Duties (Freight Carriers), page 981:

"Although the liability of a transportation company as an insurer ceases upon arrival of the freight

at the depot, it becomes responsible thenceforward under its contract as warehouseman for a want of proper care in the delivery of the freight.

"A carrier is a servant of commerce, and is protected under constitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he can not be protected as a carrier. In State v. Creeden, 7 L. R. A., 298, 78 Iowa, 556, the shipment of liquor had been received at the place of destination from six to fifteen days prior to the seizure, and was kept in the railroad freight house, or warehouse, used for storing freight transported or for transportation upon the railroad. It was said it is a familiar rule of the law that upon the arrival of freight at the place of destination, and its deposit in the carrier's warehouse, his responsibility as carrier ceases. He becomes, as to the freight and the consignor and consignee, a warehouseman."

In the case of Iowa v. Creeden, 78 Iowa, 556, the court said:

"A carrier is a servant of commerce, and is protected under constitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he can not be protected as a carrier." * * *

The evidence in this case shows that the plaintiff in

error had constructively delivered this package to Meece; that it did not hold it as a common carrier; that it had been stored in its warehouse by agreement between it and Meece to enable him to get the money to take it out; that the plaintiff in error having ceased to sustain the relation of common carrier to said whisky, it was not protected by the regulations of interstate commerce when it delivered it, or accepted the pay therefor; that the acceptance of the C. O. D. charges was not a part of the interstate transportation of it; and said act constituted an offense within itself; and the same applies to package in case 332.

In the case of Emert v. Missouri, 156 U. S., 296 (39 : 430), involving the validity of a statute of Missouri prohibiting peddlers from selling goods before they should take out license to do so, the statute was held not to violate the commerce clause of the Constitution of the United States because it made no discrimination between residents or products of the State and those of other States.

Here it was the privilege of selling in a peculiar way which was prohibited without a license; and it was then decided that the law applied to a person selling articles manufactured in another State as well as to articles manufactured in Missouri. So if the local option C. O. D. statute applies to whisky shipped into Kentucky as well as to whisky shipped from one place in the State to another, still the State may prohibit the privilege of selling C. O. D. packages without in the least interfering with or regulating interstate commerce. It is the manner of sale, rather than the right to sell, which is prohibited by the statute.

The State court's construction of this statute is not subject to review unless that construction presents a Federal question. The State court says that the statute in question was not intended to apply, and does not apply, to interstate commerce.

In the case of Rippey v. Texas, 193 U. S., 502 (48 : 767), this court was dealing with the power of the State to control by legislation the sale of whisky, and said:

> "It is a question of the power of the State as a whole. But the State has power to prohibit the sale of intoxicating liquors altogether, if it see fit, and that being so, it has power to prohibit it conditionally. * * * *The State has absolute power over the subject.*"

If the State has absolute power over the subject, then it has the power to provide that the acceptance by an express company of the pay for a C. O. D. package of whisky, which is known to be such, whether interstate commerce or intrastate commerce, shall constitute a sale at the place where the whisky is paid for. Although the provision of the State law prohibiting such companies from receiving the pay for such packages may be said to incidentally affect interstate commerce, it is no attempt to regulate it to say to such companies, you shall not constitute yourselves the collecting agents of whisky dealers, who may thus evade the law and convert an express office into a warehouse and saloon in every local option district of the Commonwealth.

The power of the State Legislature of Kentucky to

enact this law, and to prohibit the acceptance of the pay for such packages as appears by the terms of said statute, or as it is made to read by the construction placed upon it by the Supreme Court in Kentucky, is not in conflict with the commerce clause of the Federal Constitution.

Noble v. Mitchell, 164 U. S., 367 (41 : 472.)

Miller v. Cornwall Railroad Co., 168 U. S., 128 (42 : 409.)

Carstairs v. Cochran, 193 U. S., 11 (48 : 596.)

THE "C. O. D." AMENDMENT.

The construction and interpretation of sub-section 4 of section 2557b, Kentucky Statutes, by the Supreme Court of Kentucky is that it neither prohibits a bona fide shipment and delivery in a local option district of an interstate commerce package of whisky shipped C. O. D. or otherwise, nor a shipment and delivery in a local option district of a package of whisky ordered from a point within the State where the sale is not prohibited and shipped into a local option district otherwise than as a C. O. D. package.

McDermott v. Commonwealth, 29 Ky. Law Rep., 750.

Adams Express Co. v. Commonwealth, 29 Ky. Law Rep., 904.

Said sub-section, *supra,* as construed and interpreted by said court, was intended by the Legislature of the State to prevent an evasion of the local option law by fraud, deception, trick or device. Before its passage, under the decision of said court in the case of James v. Commonwealth, 102 Ky., 108, the whisky dealers of the State made some sort of arrangements with the

common carriers of the State, by which said common carriers acted as the agents of said whisky dealers in the sale of and collection for their whisky in every local option district of the State; and in this way they evaded the law. As most of the parties who purchased the whisky in such local option districts were miners and irresponsible persons, the whisky dealers would not send it except C. O. D. Hence. to make the law effectual, the Legislature passed the act amending the law, by providing that the delivering of the whisky or the acceptance of the money for said C. O. D. packages was a sale thereof within the meaning of the local option law. As thus construed, said local option law is not in conflict with the interstate commerce clause of the Federal Constitution.

Whether or not the whisky in question was shipped, delivered, or the pay therefor received under an arrangement between the plaintiff in error and its unknown consignor, who is known in the record as "Lock-box No. —, Cincinnati, Postoffice, Ohio," was a question of fact; and whether or not the plaintiff in error entered into the arrangement by which it held, delivered and accepted the C. O. D. charges on said packages, was a trick, device, fraud or deception for the evasion of the local option law, or a bona fide transaction, was a question of fact; and the decision of the Supreme Court of the State on these questions of fact, is not subject to review by this court, and presents no Federal question.

In the case of Castillo v. McConnico, 168 U. S., 674 (42 : 624), the court said:

> "A Federal question is not presented to this court for review, although decided by the State

court, if questions of a purely State character were passed upon by that court, which are sufficient to sustain its decree, wholly independent of the Federal question. * * *

"The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

The Erie Railroad Co. v. Purdy, 185 U. S., 148 (46 : 847), was in error to review a judgment of the Supreme Court of New York under the mileage book act, which was claimed to be repugnant to the Constitution of the United States as it was a regulation of commerce between the States. The act was construed by the Supreme Court of New York not to apply to interstate commerce but to intrastate commerce only.

It was there held:

"No Federal question is presented by a claim in a State court that a State statute is inconsistent with the power of Congress to regulate commerce among the several States, where the judgment of the State court sustaining the validity of such enactment proceeds on the theory that the statute is intended to, and does, apply only to domestic transportation."

THE LEGISLATURE HAS THE POWER TO DETERMINE WHETHER OR NOT THE SALE OF WHISKY IS DETRIMENTAL TO THE PEACE, MORALS AND WELFARE OF THE PEOPLE.

The general rule is that there is no limitation upon the legislative power of the Legislature of a State,

except those found in its Constitution; and it has been many times decided by this court that neither the Federal Constitution nor the 14th amendment took from the States those powers of police to protect the lives, liberty and property of its citizens, and to promote their health, morals, education, peace and welfare. In speaking of where and by whom the police power of the State shall be put in force, this court in the case of Mugler v. Kansas, 123 U. S., 678 (31 : 210), said:

> "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety."

In the case of Reymann Brewing Company v. Brister, 179 U. S., 450 (45 : 274), the court said:

> "It was for the Legislature to determine the form of the traffic that required to be regulated as a source of evil."

Hence, by sub-section 4, section 2557b, the Legislature

of Kentucky determined that the form of the traffic in local option districts, through and by means of C. O. D. packages shipped therein, was the evil to be regulated; and in the exercise of its police power provided that the delivery of such packages or the acceptance of the pay therefor in such district, was, within the meaning of the law, a sale therein, and the party so doing was liable under the law.

ACCEPTANCE OF C. O. D. CHARGES PROHIBITED.

Sub-section, 4 section 2557b, provides that the acceptance of the money, or delivery of the C. O. D. package, is prohibited, and is unlawful, and constitutes a sale thereof at the place where the money is paid or the goods delivered.

The Commonwealth contends that, while this statute does not apply to the delivery of an interstate transportation which is delivered in a reasonable time in the due course of business, it does prohibit the acceptance of the C. O. D. charges by the plaintiff in error, and that it does not thereby regulate or interfere with interstate commerce, because the collection of said charges is not necessary to the freedom of said transportation and delivery of such packages, and does not form a part thereof. It does not incidentally affect such transportation.

As the State court said:

> "Appellant cannot shelter itself under its common-law duty as a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract,

and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent."

Am. & Eng. Ency. of Law, vol. 12, p. 553.

On this subject it is said:

"There is no common-law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, expressed or implied."

Cox v. Columbus, &c., Co., 91 Ala., 392.

McNichol v. Pacific Express Co., 12 Mo. App., 401.

The collection of said charges, not being a part of the interstate transportation and being unlawful under the prohibition laws of the State, and the appellant being presumed to know the law, its contract to collect said charges will not be protected by the interstate commerce clause of the Federal Constitution as it was not intended to be a shield for criminals.

THE COMMONWEALTH HAVING MADE A PRIMA FACIE CASE, THE BURDEN WAS ON THE PLAINTIFF IN ERROR TO SHOW THAT THE ACCEPTANCE OF THE C. O. D. CHARGES, OR THE DELIVERY OF THE PACKAGE, WAS A PART OF INTERSTATE TRANSPORTATION.

The Supreme Court of this State in its opinion said:

"When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. * * * The defendant cannot say that it did not know the transaction

was an illegitimate one, or that it believed it was a bona fide shipment. It must show in defense of its otherwise illegal act in Knox county that the State law did not apply to it at that time, because what it did was in pursuance of an act of interstate commerce. * * * As said before, in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce."

"State v. Robinson, 49 Maine, 285.

"In this case four baskets of champagne were seized under the laws of the State, and the question arose, whether or not, they being in the original packages, were subject to seizure, and the question of interstate commerce was involved. It was said:

"It is not pretended, in the case at bar, that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had shown no right to sell, were correct; and the exceptions must be overruled."

"Commonwealth v. Zelt, 139 Pa. St. Rep., 615.

"This case in principle involved the same question as the Maine case above cited. The court, on the question in hand, said:

"The fourth assignment is not sustained. The fact that defendant Porter was the agent of an importer was a matter of defense, and the burden was upon him to establish it by competent evidence, to such an extent as to throw a reasonable doubt upon the Commonwealth's case. This is substantially what the court below said to the jury."

State v. Miller, 53 Iowa, 87.

Orme v. Commonwealth, 21 R., 1412.

Rice on Evidence, section 260, p. 425.

NO JURY.

A jury having been waived in case No. 332, and the cause having been submitted to the trial court without the intervention of a jury the judgment therein, is, under the practice in Kentucky, the verdict of a properly instructed jury.

Ellison v. Commonwealth, 6 R., 306.

City of Mt. Sterling v. Holly, 22 R., 358.

Civil Code, section 332.

Said section of the Civil Code above cited reads:

> "Upon trials of questions of fact by the court it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

There was no request of the court for the separation of its finding of fact from its conclusions of law, nor was this done, and there was no objection or exception made thereto. It is the contention of the State that the only question before the court in this case is the sufficiency of the indictment.

American Mut. Aid Society v. Bringer, 91 Ky., 406.

Kossett v. Snead, 21 R., 777.

Buler v. Sandidge, 20 R., 1581.

Day v. Adams, 20 R., 1827.

THE STATUTE IN QUESTION IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE, NOT INCONSISTENT WITH THE REGULATION OF COMMERCE BY CONGRESS.

The Supreme Court of Kentucky upheld the local option statute in question upon the ground, not only because, by the construction placed on it by said court, it did not apply to interstate commerce, but because it was a legitimate exercise of the police power of the State, not inconsistent with the power of Congress to regulate interstate commerce.

The plaintiff in error knew that the local option law of the State was in force at Barbourville, Ky., that the sale of whisky was prohibited therein, yet it has been engaged for 14 years receiving, holding, delivering and accepting the C. O. D. charges on such packages. It is the contention of the Commonwealth that this is nothing more than a trick, device and an evasion of the law by the plaintiff in error, and that it knew, or could have known that it was such, by the exercise of ordinary diligence.

In Schollenberger v. Penn., 171 U. S., 15 (43 : 54), the court had before it an act of the Legislature of Pennsylvania prohibiting the sale of oleomargarine which had been shipped into that State; and while the court held said act an attempt to regulate interstate commerce invalid, the court said:

> "In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State."

In the case of Plumley v. Mass., 155 U. S., 460 (39 : 223), the court had before it a statute of Massachusetts.

Plumley was convicted under said statute for the sale of oleomargarine in Boston, as the agent of a firm at Chicago, Ill. It was admitted that the oleomargarine was sent to him by said firm from Chicago, and sold by Plumley in the original package. It was claimed by him that said statute was repugnant to the clause of the Constitution providing that Congress shall have power to regulate commerce among the States. The question there was whether or not the statute in its application to sales of oleomargarine brought into that State from other States was in conflict with said clause of the Federal Constitution. The court said:

> "It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution *does not prohibit* the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that 'cause it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited. * * *
>
> "Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?
>
> "We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the States to protect the morals, the health and safety of their people by

appropriate legislation sometimes touches, in its exercise, the line separating the respective domains of national and State authority. But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and exercise all powers not delegated to the Union,' the judiciary of the United States should not strike down a legislative enactment of a State—especially if it has direct connections with the social order, the health and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

Can it be that the interstate commerce clause of the Constitution of the United States was intended to secure to any one the right to ship a product into a Territory and sell it when the State, in the exercise of its reserved rights and under its police power, had prior thereto declared that such product is detrimental to the morals, peace and welfare of its people, and had prohibited such sale? Does the right to regulate legitimate commerce between the States confer upon Congress the right to determine what is or is not detrimental to the peace, morals and welfare of the people of the several States?

This court has declared time and again that such was not the interpretation and construction to be placed on said interstate commerce clause.

In Sherlock v. Alling, 93 U. S., 108 (23 : 820), Justice Field said:

> "In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution."

Kentucky Statutes, section 2557b, sub-section 4, was a remedial statute to prevent the evasion of the local option laws. In James v. Commonwealth, 102 Ky., 108, the Supreme Court of Kentucky had held that the *place of sale* was the place from which the whisky was ordered and shipped. Under this ruling the local option law was ineffectual to prevent the sale. The statute in question was not intended to regulate domestic or interstate commerce, but to fix the *place of sale* of such C. O. D. shipments "at the place where the money is paid or the goods delivered," and to fix the liability of persons who either receive the money or deliver the whisky.

As said in Sherlock v. Alling, 93 U. S., 108 (23 : 921):

> "Legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In the case of Crossman v. Lurman, 192 U. S., 188 (48 : 401), the court had under consideration a statute of New York, which prohibits the sale within said State of adulterated food products, and the court then said that such statute

> "Does not, as applied to food *products imported* into the United Stated through the channels of foreign commerce, violate the commerce clause of the Federal Constitution, but is a valid exercise of the police power of the State to legislate for the benefit of its people in the prevention of deception and fraud." (Syllabus.)

INDICTMENT.

The sufficiency of the indictment herein was a question for the decision of the State court alone, and the ruling of the State court in overruling the appellant's demurrer thereto presents no Federal question.

Colwell v. Texas, 137 U. S., 699 (34 : 818).

Davis v. Texas, 139 U. S., 657 (35 : 302).

Bergemann v. Backer, 157 U. S., 655 (39 : 846).

Howard v. Fleming, 191 U. S., 127 (48 : 124).

THE FINDINGS OF FACTS.

One of these cases was submitted to the court on the law and facts without the intervention of a jury, but without a request for a separation of the court's findings of fact from its conclusions of law.

The other case was submitted on the instructions of the court to the jury for its findings of the facts.

In either case the facts must be taken as found, and presents no question for review.

Missouri, K. & T. R. Co. v. Haber, 169 U. S., 629 (42 : 887).

Western U. T. Co. v. Call Publishing Co., 181 U. S., 90 (45 : 770).

Telluride P. T. Co. v. Rio Grand W. R. Co., 187 U. S., 566 (47 : 307).

In the case of Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S., 222 (48 : 948), Justice Bewer said:

> "It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the *conclusions of the highest court of a State upon questions of fact.*"

In the case of Minneapolis & St. Louis Railroad Co. v. Minnesota, et al., 193 U. S., 553 (48 : 619), Justice McKenna said:

> "It is well established that on error to a State court this court cannot re-examine the evidence, and when the facts are found, we are concluded by such finding."

In the case of Eastern Building & Loan Asso. v. Ebough, 185 U. S., 119 (46 : 833), the court said:

> "This is a writ of error to the State court, and *whatever was a question of fact there is a question of fact here.* * * * This court, and other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; but in this court, when acting under its appellate jurisdiction, *whatever was matter of fact in the court where judgment or decree is under review, is matter of fact here.*"

In the case of Jenkins, et al. v. Neff, et al., 186 U. S., 230 (46 : 1142), the court said:

> "Findings of fact in State courts are on writ of error conclusive with us."

Thayer v. Spratt, 189 U. S., 350 (47 : 848), in this case, Justice Peckham writing, the court holds that it is without jurisdiction to review the evidence upon which the findings of the State court rest, on writ of error:

> "We are precluded by the finding of facts in the State court from looking at the evidence upon which such findings may rest. Upon a writ of error to a State court this court *has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence*"

Telluride Power Transmission Co. v. Rio Grade W. R. Co., 187 U. S., 569 (47 : 307).

In the case of Western Union Tel. Co. v. Call Pub Co., 181 U. S., 92 (45 : 771), the court said:

> "But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not subject to review in this court."

Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S., 625 (44 : 299).

Bartlett v. Lockwood, 160 U. S., 356 (40 : 455).

Hedrick v. Atchison, T. & Santa Fe R. R. Co., 167 U. S., 674 (42 : 321).

JURISDICTION.

The Federal question presented in the State court was that the local option statute of the State, as amended by sub-section 4, section 2557b, was, and is, repugnant to the interstate commerce clause of the Federal Constitution. The decision of the Supreme Court of the State was that this statute did not apply to interstate shipments; that neither the prohibition law nor said amendment undertakes to regulate interstate commerce, and that the Legislature had not attempted to do so by the statute in question; that it was not necessary to a determination of the appellant's liability that the State court should decide whether or not said statute was repugnant to said commercial clause; and then decided the case on another ground against the appellant, to-wit: That said sale and delivery was not an interstate commerce transaction, but, from the evidence, it was a trick, device, fraud and deception by which the local option laws of the State were evaded. Hence there is no Federal question presented for review, and this court is without jurisdiction.

Eustis, et al. v. Bolles, et al., 150 U. S., 361 (37 : 1111). In this case the court said:

> "It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively not only that a Federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.
>
> "It is likewise settled law that, where the record

discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Harrison v. Martin, 171 U. S., 37 (43 : 63).

New Orleans v. New Orleans Water Works Co., 142 U. S., 79 (35 : 943).

Before this court can be asked by the appellant to determine whether or not the local option law of Kentucky is repugnant to the commerce clause of the Federal Constitution, it must have been determined necessarily, first, that the transaction in question was an interstate commerce transaction, and the acceptance of the C. O. D. charges or the delivery of said packages was a part of the interstate transportation; but whether or not such acceptance of said C. O. D. charges or the delivery of said packages was a part of said interstate transportation, was a question of fact to be determined from the evidence by the State court, and said court having decided it was not an interstate commerce transaction, and this court being without jurisdiction to pass on the weight or sufficiency of the evidence, there is no question of law which it can review.

In the case of Dower v. Richards, 151 U. S., 661 (38 : 307), the court said:

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the deci-

sion of the State court upon the question of fact is not within the jurisdiction of this court.

"In the legislation of Congress, from the foundation of the government, a writ of error, which brings up matter of law only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact. * * *

"Upon such a writ of error this court, as is well settled, can not review a decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by the judge without a jury. * * *

"That this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them in cases very like the one now before us.

"In Campau v. Lewis (1865), 70 U. S., 669 [3 Wall., 106] (18 : 211), a decision of the State court as to the value of land conveyed by deed, upon which depended the requisite amount of stamps under the revenue law of the United States, was held not to be reviewable, although, if the value of the land had been admitted, a Federal question would have been presented. * * *

"There could have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation." * * *

CONCLUSION.

All will agree that there comes a time when the act of transportation from one State to another ceases to be interstate commerce. Can the carrier indefinitely hold the articles transported in its warehouse, and without notifying the consignee or consignor, thus prevent the articles mentioned in the Wilson act from becoming subject to the laws of the State enacted in pursuance of its reserved powers for the protection of the health and welfare of its people?

The Commonwealth contends that, when the transportation of such articles has reached its termination, and the articles have been tendered to the consignee, or they have been held for such reasonable time in the usual course of business as would permit a delivery, the act of transportation ceases to be interstate commerce; and if the common carrier then stores them and afterwards delivers them, or accepts C. O. D. charges, it is subject to the State law.

Wherefore we ask that the judgment in each case be affirmed.

N. B. Hays,
Chas. H. Morris,
For Defendant in Error.

APPENDIX.

JUDGMENTS AND DECREES OF STATE COURTS ON WRIT OF ERROR.

United States Compiled Statutes 1901, section 709:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, at their dis-

cretion, award execution, or remand the same to the court from which it was removed by the writ."

LOCAL OPTION LAWS.

Kentucky Statutes 1903.

§ 2557. *Penalty for Selling in Violation of Law—Or Furnishing House or Room to Sell in.*—After the entry of the certificate of the canvassing board as above provided for, in the order book of the county court, if the vote was given against the sale, barter or loan of spirituous, vinous or malt liquors in the said county, city, town, district or precinct, as the case may be (there seems to be an omission here—Ed.), to any person, except as hereinafter provided; and any person who shall sell, barter or loan, directly or indirectly, any such liquors in said county, city, town, district or precinct shall, upon conviction, be fined not less than sixty nor more than one hundred dollars, or be confined in the county jail for not less than ten nor more than forty days, or both so fined and imprisoned, in the discretion of the court or jury, for each offense; and any person who knowingly furnishes or rents a house, room, wagon or any conveyance or thing, in which spirituous, vinous or malt liquors are sold, bartered or loaned, in violation of this act, shall, upon conviction thereof, be fined not less than sixty nor more than one hundred dollars, and the house, wagon, vehicle, land or other thing in which the liquors were sold, bartered or loaned shall be liable for all fines adjudged against the person selling, bartering or loaning the same.

§ 2557a. *Intoxicating Beverage—Penalty for Selling—What Constitutes Sale.*—It shall be unlawful for any one

to sell, barter or loan, directly or indirectly, any beverage, liquid mixture or decoction of any kind which produces or causes intoxication, in any county, city, town district or precinct, in which the sale, barter or loan of spirituous, vinous and malt liquors is or shall be prohibited in accordance with the local option law. Any person who shall sell, barter or loan, directly or indirectly, any such beverage, liquid mixture or decoction in any such county, city, town, district or precinct shall, upon conviction, be fined the sum of not less than twenty nor more than one hundred dollars for each offense; and any sale, barter or loan of any article, with the agreement, expressed or implied, that the right or title to or possession of any such beverage, liquid mixture or decoction shall also pass, shall be considered a sale, barter or loan within the terms of this act.

§ 2557b. 1. *Indictment—Allegations of.*—In an indictment for a violation of any provision of the act approved March 10th, 1894, entitled "An act whereby the sense of the people of any county, city, town, district or precinct may be taken as to whether spirituous, vinous or malt liquors shall be sold, bartered, or loaned therein," or for a violation of any act amendatory thereof, it shall not be necessary to allege that a vote was taken or an election held, or any other step relative thereto; but it may be simply stated that the act, or acts, charged were committed in a territory where the said act was in force; and in said indictment it shall be sufficient to designate said act as the local option law.

2. *Penalty for Selling or Having Possession of Liquor —U. S. Revenue Stamp Evidence of Guilt.*—It shall be unlawful for any person to sell, lend, give, procure for,

or furnish to another, any spirituous, vinous or malt liquors, or to have in his possession spirituous, vinous or malt liquors, for the purpose of selling them in any territory where said act is in force, and any person so offending shall be fined not less than fifty nor more than one hundred dollars, and imprisoned not less than ten nor more than fifty days.

The possession of a United States special tax stamp (commonly called United States license) for carrying on the business of a retail dealer in spirituous, vinous or malt liquors, or the having of such tax stamp or license stuck up at the place of business in such territory, shall be *prima facie evidence of guilt under this section.*

3. *Bond for Good Behavior.*—On the second or any subsequent conviction for a violation of said act, or any of its amendments, the court shall require the defendant to execute bond in the sum of two hundred dollars to be of good behavior for the period of twelve months.

The court may, in its discretion, increase the amount of the bond, and if the bond is not given the defendant shall be committed to the county jail for a period not exceeding ninety days, to be fixed by the court.

4. C. O. D. Shipments—Where Sale Takes Place —All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called "C. O. D. shipments," into any county, city, town, district or precinct where said act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof.

§ 2569. *Delivery by Agents of Liquor Shipped—Penalty.*—That it shall be unlawful for an owner, operator, agent, clerk, occupant or other person of any depot, storehouse, warehouse, storeroom, office, steamboat, wharfboat, or other place situated or being in any county, town, city, district or precinct in this Commonwealth wherein the sale of spirituous, vinous, malt or intoxicating liquors are, at the time prohibited by law, to deliver any such liquors to, or receive pay for same from, any person except the party to whom the same has been billed or shipped, and to whom the same is addressed; and any one so offending shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense.

§ 2570. *Trick or Device to Evade Law.*—No trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous, vinous or malt liquors without license, or in violation or evasion of any local option laws prevailing in any county, town, city, precinct or municipality of this Commonwealth.

§ 2571. *Evidence Upon Which Conviction May be Had.*—A conviction for the offense of selling spirituous, vinous or malt liquors without license so to do, or for selling same in any county, town, city, precinct or municipality of this Commonwealth where local option laws prevail, may be sustained against the person in possession of the premises on which said liquor is obtained, furnished or disposed of in violation or evasion of law, if the following facts appear: A house, room, inclosure or other place where spirituous, vinous or malt liquors are furnished or obtained in violation or evasion of law, or where some

device is used to dispose of, furnish or obtain such liquor in violation or evasion of law.

§ 2572. *Person in Possession of Premises—Penalty.*—The person in possession of the premises on which liquor is sold, disposed of, obtained or furnished in violation or evasion of law, by any trick or method whatever on conviction, shall be fined not less than twenty nor more than one hundred dollars for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished or disposed of.

DECISIONS OF THE COURT OF APPEALS OF KENTUCKY.

ADAMS EXPRESS CO. v. COMMONWEALTH.

(Filed June 17, 1905.)

27 Kentucky Law Reporter, 1096.

Local Option—C. O. D. Shipments—Knowledge of Carrier—Agreement to hold for Consignee—Liability.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Adams Express Co., a common carrier, was indicted, tried and convicted in the Laurel Circuit Court for the offense of unlawfully, willfully and knowingly shipping, procuring for, furnishing, selling and delivering spirituous liquor, by C. O. D. shipment, to one George Meece, at East Bernstadt, in Laurel county, the

sale of such liquor being prohibited by certain statutes enacted by the Legislature of Kentucky, approved April 4, 1884, March 10, 1894, and March 11, 1902. These acts were then in force in the five counties of Laurel, Rockcastle, Jackson, Owsley and Clay. The trial jury fixed the punishment of appellant at a fine of $60, on which judgment was duly entered, and the lower court having overruled its motion for a new trial, it prosecutes this appeal.

In Crigler v. Commonwealth, 27 Ky. Law Rep., 918, it was held by this court that what is known as the "Five Counties Act" of April 4, 1884 (Acts 1883-4, chapter 598, volume 1, page 1116), forbidding the sale of liquors in the five counties named therein, is in force in Laurel county as is the local option law of March 10, 1894, together with the amendment thereto of March 11, 1902 (section 2557, Kentucky Statutes), and that the two acts last mentioned must be construed as a part of the act of 1884, regulating and controlling the former as to procedure, the quantity of liquor sold to constitute an offense, and the punishment; that is, it was held that the local option act of 1894, as amended by that of 1902, is operative in Laurel county without the necessity of a vote by the people, and that of the existence of the act of 1884, and the operation of that of 1894, as amended in 1902, this court will take judicial notice. The fine inflicted against appellant was imposed under the act of 1894, as amended in 1902. (Section 2557, Kentucky Statutes.)

Sub-section 4, section 2557, Kentucky Statutes, which is also a part of the general local option law as amended in 1902, provides: "All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, com-

monly called C. O. D. shipments, into any county, city, town, district or precinct where said act is in force shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The offense of which appellant was convicted is the one denounced by the foregoing section, and it is insisted for it that the alleged sale of spirituous liquor, for which it was indicted and convicted under the statute, was a mere delivery of the liquor by it as a common carrier in the usual course of business, and the money paid its agent by the consignee was in satisfaction of the amount due the consignor therefor upon a sale thereof made in the State of Ohio, which appellant, as a common carrier, was under the contract of shipment compelled to collect and remit consignor upon delivery of the goods; and further, that the transaction was authorized and appellant protected, by the law and regulations of interstate commerce.

The case went to the jury upon the evidence of the Commonwealth alone, none having been introduced by the appellant. The undisputed facts established by the evidence were:

1st. That George Meece within a year before the finding of the indictment called at appellant's office in East Bernstadt with his brother, who had ordered and was expecting from Cincinnati a package of whisky which he found awaiting him in appellant's office.

2d. While in the express office George Meece was informed by appellant's agent in charge that a package containing a gallon of whisky was then in the office for him, the charge upon which was $3.85. He then informed

appellant's agent that he had not ordered the whisky, was not expecting it, and had not the money with which to pay the charges thereon, but if satisfactory to the agent, and the latter would hold the whisky for him until the following Saturday, a week later, he would at the express office, pay for the whisky and take it away, to all of which the agent readily assented, and on the following Saturday Meece called at the express office, paid the agent $3.85 for the gallon of whisky, received and took it away.

3d. The agent knew that the package contained a gallon of whisky (i. e., four quart bottles), and that it was shipped by Crigler & Crigler, of Cincinnati, but did not advise Meece of the name of the consignors, though informed by Meece that he had not ordered the whisky.

4th. The agent also knew the business of Crigler & Crigler, and that they were in the habit of shipping almost daily by express, C. O. D., to appellant's East Bernstadt office, packages of both whisky and brandy, consigned to persons of that community. In view of the foregoing facts it becomes necessary to determine whether, in holding the whisky a week at Meece's request, and until the latter again called at the office, paid the necessary charges and took it, the appellant continued in the relation of carrier to the goods; or did it, by the transaction in question, cease to be a common carrier and become a mere bailee or warehouseman.

On this point Hutchinson on Carriers, 2d edition, sec. 354, states the general rule as follows: "The law upon this subject may, therefore, be stated to be that, so long as the carrier continues in the relation of carrier to the goods, he is under an absolute engagement that they shall be delivered only to the person to whom they are consigned; but that when from any cause he ceases to hold

them as carrier, and becomes a mere warehouseman or bailee, the degree of responsibility resting on him becomes changed, and from that moment, if the goods are lost by misdelivery or otherwise, it becomes a question of fact whether he has exercised reasonable care and diligence."

In section 356 of the same book it is said: "It, therefore, frequently becomes a question of importance as well as of difficulty to determine when and under what circumstances the relation of carrier to the goods has ceased and their custody has become a bailment. It may be stated, as a general rule, that when the carrier has done all the law requires him to do towards delivery, and from any cause he fails to effect it, and the goods are continued in his possession, he from that time becomes responsible only as depositary."

In further elaboration of this doctrine the author in section 385 tells us: "But it has been held that if the carrier is instructed not to deliver the goods until they are paid for, and the consignee, instead of refusing to take them, promises to pay for them and take them in a few days, and request the carrier to keep them until he is ready to pay for them, the carrier becomes a warehouseman of the goods, and if they are lost or destroyed while so held, without any fault or negligence of his, he will not be liable, although he has given no notice of the fact to the consignor."

A similar view of the doctrine, supra, was announced by this court in Wald & Co. v. Louisville, Evansville & St. Louis R. R. Co., 92 Ky., 645. So we may accept it as the law of this State. When a package marked "C. O. D.," (collect on delivery) is received by an express company for shipment, it is manifestly upon the condi-

tions that such company, as a common carrier, shall promptly deliver it to the consignee, collect of the latter a specified sum therefor, and with equal promptness return it to the consignor. Express companies do not more surely deliver goods entrusted to them than do ordinary freight trains, but they undertake a quicker delivery, and by reason of such undertaking are permitted to charge, and are paid more for the transportation of goods than are railroad companies. A failure, therefore, upon their part to immediately, that is, in a reasonable and customary time, deliver goods shipped in their charge, or their holding of such goods an unreasonable or unusual time, changes their relations at once from a common carrier to that of ordinary warehouseman.

In view of this rule, and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whisky in question, and in receiving the price paid by the latter therefor, appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was, or could have been, protected in the transaction by the law of interstate commerce. We are aware that section 5958, Revised Statutes of the United States, confers upon railroad and express companies authority to carry freight from one State to another free from interference on the part of the States, and that the Supreme Court of the United States, conconstruing this statute and defining the power of congress with reference to its right "to regulate commerce with foreign nations, among the several States and with the Indian tribes," has repeatedly held "that State legislation which seeks to impose a direct burden upon inter-

state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress."

It has also been held by the same court that when intoxicating liquors are shipped from one State to another by express C. O. D., upon an order or instructions from the purchaser residing in such other State, the contract of sale is to be regarded as completed in the State from which the shipment is made, upon the vendors there delivering the goods to a common carrier, although with the directions to collect the price from the consignee before its delivery to him, and that the right of the importer to thus sell and ship liquors in unbroken packages in another State exists regardless of the local laws of such State prohibiting such sales and shipments, and notwithstanding the provisions of the act of congress, known as the "Wilson Bill," which was intended to enable the several States, under the exercise of the police power, to enact such legislation as would give them the same control over intoxicating liquors shipped therein from other States after their arrival, whether in original packages or otherwise, as they might exercise over those of home manufacture or production.

But in the case at bar the conviction of appellant was not in violation of any regulation of the laws of interstate commerce. It sold and delivered to Meece a gallon of whisky and received of him $3.85 as the price of such sale, all with full knowledge of the fact that it had not been ordered by him. Furthermore, though appellant may have originally received the package of whisky as a common carrier, at the time of its sale it, as before stated, did not sustain to the package of whisky, or to the consignor or consignee, the relation of carrier, but that of bailee or warehouseman. In other words, the sale was

not made in another State, or by a shipper therein, but by appellant at East Bernstadt, in Laurel county, Kentucky, and in violation of the laws of the State which, by sub-section 4 of section 2557, Kentucky Statutes, makes such sale a misdemeanor.

Whatever ground may be urged for holding that this statute is imperative as to a shipment of spirituous liquors into this State from another State made by the vendor, upon an order received in such other State from the purchaser in this State, it certainly can not be void as to a sale wholly made and consummated in this State by a bailee after the whisky was received from another State.

Being of opinion that appellant's conviction was proper, the judgment is affirmed.

ADAMS EXPRESS CO. v. COMMONWEALTH (No. 1835).

(Filed April 27, 1906.)

29 Ky., Law Rep., 234.

Local Option—Non-resident—Shipping Whisky into Local Option County in Kentucky—Liability of Carrier.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Barker, affirming.

The appellant was indicted by the grand jury of Knox county, Kentucky, for a violation of the prohibition law prevailing therein. The indictment contains much surplusage with reference to what is called the C. O. D. statute, and as to the manner in which the Adams Express Co. received the whisky said to have been sold by it in contravention of law.

Stripped of all unnecessary verbiage, the indictment

contains a statement sufficient to charge the defendant company with a sale of liquor by retail, in violation of the prohibition statute applicable to Knox county; and as to the unnecessary allegations, they may be dismissed from view under the shelter of the maxim, *utile per inutile non vitatur.*

The defendant company pleaded not guilty, and the case was submitted to the court on the law and facts, the intervention of a jury being waived, resulting in an adverse judgment against it.

The evidence showed, for the Commonwealth, the delivery by the defendant's agent, J. A. Owens, to one J. D. Main of a gallon of whisky, for which he paid $3.85, which the agent at once transmitted to the shipper of the whisky in Cincinnati; also that Main did not order the whisky, and did not know the name of the consignor, but it was shipped to him at Barbourville, Knox county, Kentucky, from Cincinnati by the Adams Express Co., C. O. D. This is but a small part of a general system prevailing, by which unscrupulous dealers in whisky undertake, through the facile aid of express companies, to evade the prohibition laws in effect in certain counties in the State, and retail liquor therein in violation of the laws forbidding such traffic. By this system the names of men accustomed to drink whisky are obtained by the dealers, and then, without any order therefor, or any contract whatever, the whisky in gallon packages is sent to various small towns throughout the prohibition counties, addressed to the parties whose names are thus acquired. The express company does not notify the involuntary consignee, but simply holds the whisky in its warerooms, and the party in whose name the liquor had been expressed receives notice, either by postal from the con-

signor, or by some local agent of his in the county, that there is an express package for him, and then whenever the thirst for liquor becomes sufficiently strong to tempt him to pay the express charges and take it out of the express office this is done. The name of the consignor is not known by the involuntary consignee, and the address for the return of the money is the number of a lock box in Cincinnati postoffice. After the involuntary consignee becomes sufficiently acquainted with the system existing between the consignor and the express company, he finds that a gallon of liquor is generally kept at the express office subject to his order and the payment of charges, and he goes there for it with the same confidence that he would go to an ordinary dealer.

The evidence in this case shows that, within six months next before the trial, J. D. Main had taken from the Adams Express Co.'s office at Barbourville, Ky., as many as twenty separate packages of whisky of a gallon each, and the testimony of the express agent shows that he often had as many as fifty gallons of whisky on hand at one time consigned to various parties under the same system. Frequently several parties club in and take out whisky together, dividing it in proportion to the amounts paid in by each, it being a rigid rule of the defendant company never to deliver the whisky to any person other than the named consignee. It was stipulated between the Commonwealth and the defendant, that the whisky in question was shipped from Cincinnati in the ordinary course of the express business.

The first and crucial question in this case is, whether or not the shipment and delivery of the whisky was an act of interstate commerce. If so, it may be conceded that the defendant should go acquit; if not, it is

partically conceded that the acts of the defendant constituted a sale of liquor in Knox county, in violation of the prohibition law.

We do not think the amendment of the prohibition law commonly denominated the "Farris" or "C. O. D." law has any bearing upon the merits of the offense under discussion. The learned counsel for appellant hinge the whole defense on the fact that the act of the express company constituted the carrying on of interstate commerce, and the C. O. D. law, being an attempt to regulate interstate commerce, which admittedly is under the exclusive regulation of the Congress of the United States, is for that reason void. This may be conceded. However, if the C. O. D. amendment was stricken from the statute book entirely, it would not affect in any way the merits of the transaction under investigation as we see it. The prohibition statute, without the amendment, forbids, under penalty, the sale of liquor by retail in Knox county; but neither the statute itself, nor the amendment thereto, undertakes to regulate interstate commerce. No statute can affect interstate commerce, and the Legislature did not attempt to do so by that in question.

We do not agree to the proposition that the transaction, which took place between the express company and J. D. Main in Knox county, was interstate commerce. Nor do we agree with the attorney general in his view of the effect of the Wilson bill upon the transaction in hand. As we understand him, he insists that, although the shipment from Cincinnati be conceded to have been a legitimate act of interstate commerce in its original inception, yet after the goods arrived in Barbourville, if kept overtime in a wareroom, then the transaction ceases to be one of interstate commerce, and becomes one of

local commerce. We do not understand the Wilson bill as construed by the Supreme Court of the United States, to have this effect upon a shipment of the kind under discussion. Without naming the decisions, or discussing them with minute particularity, we understand the Supreme Court to have decided in the various cases cited in the briefs of counsel, that, where the whisky is purchased in a foreign State, it may be shipped by the seller to the buyer, into a State where the sale of liquor is prohibited by law; that it is interstate commerce unaffected by the local law until it is delivered to the consignee, and the mere lapse of time, or the particular place where the goods are kept until called for, have no effect to change the quality of the transaction so that it ceases to be interstate commerce before the delivery. If this were not true, then if the consignee happened to be absent from home, or refused to call for his goods promptly, that which was a legitimate transaction in its original inception would become vicious and illegal by the mere lapse of time occasioned by the negligence of the consignee. If the transaction be interstate commerce originally, it continues so until the goods are delivered into the hands of the consignee.

But was this transaction interstate commerce? No contract of purchase is even pretended to have been made in Cincinnati. So far as the consignor is concerned, he simply shipped his illegitimate goods into the State of Kentucky, to a point where the prohibition law prevails, and through the instrumentality of the express company there made a sale to J. D. Main. No one disputes, or can dispute, that the transaction, so far as the consignor was concerned, was illegitimate and in violation of the

law. He shipped forbidden goods into a prohibition district of Kentucky for the chance of being able to sell it after it reached its destination, to Main. So far as he is concerned, the transaction in substance is the same as if he had brought the whisky himself to Barbourville, and there sold it to Main. This being true, the transaction was not interstate commerce.

The Commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox county, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the State statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to establish this fact is upon the defendant. There can be no doubt of the soundness of this proposition. When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction out of which grew the offense with which it stood charged was interstate commerce? The answer to this must be in the negative. It simply showed that it received in Cincinnati, in the usual course of business, which means no more, as we understand it, than that the goods were shipped in the ordinary way, whisky consigned to J. D. Main in Barbourville, Ky.; but this does not constitute interstate commerce; unless there was a bona fide shipment to a

real consignee in Barbourville, the transaction was not interstate commerce, but a mere simulacrum of interstate commerce. In this case there was no bona fide shipment of merchandise from Cincinnati to Barbourville, but there was an illegal sending of whisky into Knox county through the instrumentality of the express company for the purpose of finding a buyer there. In its very substance, the unknown consignor, whose headquarters is a lock box in the Cincinnati postoffice, simply appointed the Adams Express Co. as his agent to find for him a purchaser in Knox county for a gallon of whisky on a given commission. The defendant can not say it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment. It must show, in defense of its otherwise illegal act in Knox county, that the State law did not apply to it at that time, because what it did was in pursuance of an act of interstate commerce. Now, interstate commerce can not be based upon fraud or chicanery; it must necessarily be a legitimate transaction. The Constitution and Statutes of the United States are not shields for criminals; nor do they furnish a means by which crime may be effectuated. The Supreme Court of the United States does not uphold criminal acts, or protect criminals from the consequence of their misdoings. The transaction which took place between Cincinnati and Barbourville bears the same resemblance to interstate commerce as the wares of the green-goodsman bears to the genuine money of the United States; both are mere counterfeits. As said before, in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce.

In the case of State v. Robinson, 49 Maine, 285, four

baskets of champagne were seized under the laws of the State, and the question arose, whether or not, they being in the original packages, were subject to seizure, and the question of interstate commerce was involved. It was said: "It is not pretended in the case at bar that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had shown no right to sell, were correct and the exceptions must be overruled."

The case of Commonwealth v. Zelt, 138 Pa. St. Rep., 615, in principle involved the same question as the Maine case above cited. The court, on the question in hand, said: "The fourth assignment is not sustained. The fact that defendant, Porter, was the agent of an importer was a matter of defense, and the burden was upon him to establish it by competent evidence, to such an extent as to throw a reasonable doubt upon the Commonwealth's case. This is substantially what the court below said to the jury."

Suppose, instead of the defense being interstate commerce, it had been licensed, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, not that it honestly believed, but that it was the agent of a licensed dealer? In the case at bar the defendant undertakes to show that it was the agent of the consignor, and that it believed the consignor's acts were

legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant can not shelter itself under its common law duty as a common carrier of goods. There is no common law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent. In Am. & Eng. Ency. of Law, vol. 12, page 553, on this subject it is said: "There is no common law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, express or implied." (Cox, Hill & Thompson v. Columbus & Western Railway Co., 91 Ala., 392; James McNichol v. Pacific Express Co., 12 Mo. App. Rep., 401.)

But passing this, while there is no direct evidence upon which one could lay his finger and say this showed knowledge, or that showed knowledge on the part of the express company, that the business in which it was engaged was a criminal one, we think, taking the evidence as a whole, and looking at the circumstances from the point of view in Barbourville, there was enough to show that the defendant was bound to know that the consignors were carrying on, systematically, a criminal business, and that the names given as consignees to the various packages of whisky shipped were fictitious. In other words, while there were real persons in Barbourville bearing the names used, these persons had no contract of purchase, but the whisky was shipped in their names with a view of tempting them to purchase it after its arrival in Barbourville.

Let it be remembered that Barbourville is a small town, scarcely above the dignity of a village, although it is the county seat of Knox county. It is a matter of common knowledge that in a small town there are no secrets; every man knows every other man; what he does; how he conducts himself, and what are his habits. The system under consideration had been carried on a long time. Owens, the express agent, states that he had been at Barbourville fourteen years; that during that time shipments of whisky have been received in the same way continuously. He admits that in no case did he ever notify any named consignee that there was a package for him. This tends to show he expected the party to be notified in other ways. Large numbers of similar packages were held by him constantly. He rigorously enforced the rule not to deliver a package to any one except the consignee. This showed him to be a formalist, and that he knew the advantage of surrounding the transaction with every semblance of legality; to borrow one of Edmund Burke's fine phrases, the transaction was made "most iniquitously legal."

We do not believe it possible for an illegitimate business to be carried on through the express company on so large a scale for so long a time, and especially where remittances were to be made to a lock box, instead of to a named firm, without its being ascertained that the system was criminal. Viewing the whole case, together with the large number of similar cases against the same defendant, involving the same facts, and which were all heard together, we are forced to the conclusion that the agents of the defendant corporation at Barbourville knew of the illegality of the system they were helping to con-

duct, and that the corporation itself was the accomplice, for pay, of the criminal consignors.

The question involved here is a most important one for the people among whom the offense was committed. The mountain counties of Kentucky are thinly populated, and the arm of the law is necessarily weak, and the passions of men correspondingly strong. We do not transcend the bounds of judicial conservatism in saying that a very large number of the cases involving violent crimes which come to this court on appeal from that section of the State are directly caused by the use of whisky. Largely influenced by this consideration, no doubt, the good people of a majority of the mountain counties have sought to control crime by the enactment of prohibition laws, and the welfare of the whole community is bound up in the enforcement of these laws. It goes without saying, however, that if, by the instrumentality of such transactions as we have under discussion, whisky can be introduced and sold by retail through the aid of the express company, which makes itself the agent to deliver the spirits and collect the pay therefor, the law is reduced to a nullity. We do not believe that an express company can legitimately thus thrust the shadow of its greed between the people and their uplift.

The judgment is affirmed.

ADAMS EXPRESS CO. v. COMMONWEALTH.

29 Kentucky Law Reporter, 904.

Opinion of the court by Judge Barker, reversing.

The appellant, the Adams Express Company, was indicted by the grand jury of Laurel county, charged with the offense of retailing liquor in that county contrary

to the local option law prevailing therein. A trial resulted in the appellant's being found guilty and a fine inflicted. From this judgment it appeals.

The evidence showed that the whisky in question was shipped C. O. D. from Cincinnati to East Bernstadt, in Laurel county, through the agency of the Adams Express Company. The package contained one gallon of whisky put up in four quart bottles, and was delivered to the consignee, William Caudell, upon the payment by him of the price of the liquor with the cost of transportation added. The evidence for the Commonwealth conclusively shows that the whisky was ordered by Caudell in Cincinnati, Ohio, and was shipped to him C. O. D. as before stated. The fact that the goods were ordered in Cincinnati takes this case without the principle enunciated in Adams Express Company v. Commonwealth, 29 Ky. Law Rep., 224, and brings it within the purview of the opinion of the Supreme Court of the United States in American Express Company v. Iowa, 196 U. S. Rep., 133, and Adams Express Company v. Iowa, Id., 147. There, upon facts in all essential particulars similar to those involved here, the Supreme Court, through Mr. Justice White, held that the shipment of the spirits was interstate commerce, and not subject to the control of prohibition statutes prevailing in Iowa.

Upon the authority of these opinions, the judgment in this case must be reversed with directions to dismiss the indictment; and it is so ordered.

McDERMOTT v. COMMONWEALTH.

(Filed September 21, 1906—Not to be reported.)

29 Kentucky Law Reporter, 750.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Nunn, reversing.

The appellant was indicted at the January term, 1906, of the Larue Circuit Court, charged with retailing spirituous liquor in quantity less than five gallons, in the town of Hodgenville, Ky., a territory where the local option law was then in full force and effect. At the May term of the court a trial was had and a fine of $60 was assessed against the appellant, from which this appeal is prosecuted.

Upon the trial of the case the Commonwealth introduced but one witness, Floyd R. Miller, who testified that he lived in the town of Hodgenville, Ky., that some time in November, 1905, he ordered four quarts of whisky from the appellant, a saloonkeeper, at Elizabethtown, Ky., over the telephone, he (Miller) being at Hodgenville and appellant at his place of business at Elizabethtown; that the appellant delivered the liquor to the agent of the American Express Co., at Elizabethtown, Ky., and was delivered by the express company to him at Hodgenville. It was not shipped C. O. D. (collect on delivery). Some time after this he paid the appellant for the whisky. It was agreed that Hodgenville was, in November, 1905, local option territory. The appellant then asked the court to give a peremptory instruction to the jury to find for him, which the court refused.

The court gave to the jury two instructions. The first was in the usual form in such cases. No. 2 is as follows: "A contract of sale by telephone between parties at

the time at Hodgenville and Elizabethtown, is to be deemed a sale in Hodgenville, for the purpose of this trial."

This amounted to a peremptory instruction by the court, to the jury, to find the appellant guilty.

We must apply the law to this case, as it existed at the time the alleged offense was committed, to-wit, November, 1905. The only question necessary to be determined is, where was the sale made, at Elizabethtown or Hodgenville? If made at Elizabethtown, the appellant should have been acquitted; if made at Hodgenville (local option territory), a fine was rightfully assessed against him. The case of Doores v. Commonwealth, in 28 Ky. Law Rep., 192, is conclusive of the question involved on this appeal. Doores was a legalized whisky dealer in Bowling Green, Ky. Emmet Williams, the prosecuting witness, resided in Glasgow, a town where the local option law prevailed. Williams, in that case, testified as follows: "I ordered a gallon of whisky from Doores in April, 1905. I either called him up on the phone or wrote to him at Bowling Green, Ky. He sent whisky from Bowling Green to me at Glasgow by Adams Express Co. I received it in Adams Express Co. office in Glasgow. After that I wrote him to send me my account. He did so, and I mailed him a money order to Bowling Green in payment."

This court said in that case: "We do not think this testimoney established a sale in Barren county, by the terms of the C. O. D. Statute, contained in section 2557b, Kentucky Statutes, for the reason that the whisky in question forwarded from Bowling Green to Williams at Glasgow, was not shipped C. O. D. There was no contract for the sale of the liquor made in Barren county. * * *

The question at last is, whether or not the sale was made in the county where the seller was at the time the order was received, or in the county where the witness received the liquor. If the principle announced in James v. Commonwealth prevails, clearly the sale was in Warren county; and this principle must prevail, unless the sale is controlled by the C. O. D. Statute; a conclusion we think precluded by the very language of the statute, which is limited in its operation to goods shipped C. O. D." In this case the trade was not completed when the conversation by telephone between the prosecuting witness and the appellant ceased. The title to the whisky yet remained in the appellant. It was necessary for him to separate four quarts of whisky from his other liquors and deliver them to the prosecuting witness, or to some one for him. It took this, at least, to complete the sale. The appellant delivered the four quarts of whisky to the agent of the American Express Co. at Elizabethtown. This act passed the title from the appellant, in this liquor, to the prosecuting witness. The Doores case, and the authorities therein cited, all agree that at the moment of the delivery of the article to the express company it becomes the agent of the purchaser.

In this case, the order was received by the appellant at his place of business, at Elizabethtown. The order was complied with by the appellant by delivering the liquor to the prosecuting witness' agent, the express company, at Elizabethtown. The trade was consummated there, and the lower court erred in not peremptorily instructing the jury to find for the appellant. The appellant's counsel contends that the action of the lower court was proper under the authority of the case of Adair v. The Commonwealth, 28 Ky. Law Rep., 659. The cases

are not alike. In that case the prosecuting witness, in the city of Mayfield, telephoned to a liquor dealer outside of the city boundary, to send him a keg of beer. The seller, by his conveyance and driver, carried the beer to the purchaser and delivered it to him in Mayfield. The purchaser offered to pay the driver, who was authorized to receive it, but refused until the purchaser went with him outside of the boundary of the city. This was clearly a trick or device to evade the law, and, further, the sale in that case was not complete until the beer was delivered to the purchaser or his agent, and that occurred within the city.

For these reasons the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

AMERICAN EXPRESS CO. v. COMMONWEALTH.

30 Kentucky Law Reporter, 207.

(Filed December 5, 1906—Not to be reported.)

Appeal from Larue Circuit Court.

Opinion of the court by Judge Settle, affirming.

Appellant, American Express Co., was fined in the Hodgenville Police Court under a warrant charging it with selling spirituous liquors, to-wit: A gallon of whisky to one Richard Graham in the city of Hodgenville, where local option was in force. It thereupon took an appeal to the Larue Circuit Court, and upon the trial in that court was again found guilty by verdict of a jury and its punishment fixed at a fine of $100, and having been refused a new trial by the circuit court, it brings the case to this court by a further appeal.

The facts, as shown by the bill of evidence, were that Graham, the Commonwealth's witness, received notice by mail that there was a C. O. D. package for him at appellant's Hodgenville office; that he called at the office and obtained the package by paying appellant's local agent, Langley, the C. O. D. charge thereon of $3.85; that the package was in a box which had nothing on it to indicate its contents, or the name of the consignor; that no information was given him by the agent as to its contents and he, Graham, did not know what it contained, when he received and paid for it, but upon opening the box, which he at once did, he discovered therein four quart bottles of whisky, and he and the agent each took a drink from one of the bottles, the latter being invited by him to do so. Graham further testified that he had not ordered the whisky, was not expecting it, and did not know the consignor, nor had he previously ordered or received whisky in that way.

Langley, appellant's agent, testified that he did not know the box contained whisky until so informed by Graham, after the latter had received, paid for and opened it, and that there were no words or marks upon the box to indicate its contents.

Appellant did not introduce or take the deposition of its Cincinnati agent, who received the box of the consignor in that city, or its train messenger in whose charge it was carried to Hodgenville. It did, however, take and read on the trial the deposition of M. E. Stone, of Cincinnati, manager of the company which shipped Graham the whisky in question, who testified in substance, that the company's name is Old Kentucky Falls Distillery, its chief office and place of business Cincinnati, and that it has no office or place of business in Kentucky; that he,

as manager of the company, shipped the whisky upon an order from Graham, which was received by mail. It does not appear from the deposition whether it was Kentucky whisky, though the witness admitted his company dealt in Kentucky whisky, but when asked if the package shipped Graham was Kentucky whisky his answer was, "I can not recall."

The witness also stated that he could not say whether appellant's Cincinnati agent who received the package knew its contents, but that in delivering to him the whisky for shipment he gave the agent no "specific" notice that the "package contained liquor, or that it was to be carried into a local option district."

In addition to the above synopisis of Stone's testimony we quote from his deposition the following questions asked him and his answers thereto:

"Q. 14. Tell how this trade was opened up by you in Hodgenville?"

"A. I do not recall."

"Q. 15. Did you receive Richard Graham's name from any one before the shipment; if so, who sent it?"

"A. I do not recall."

"Q. 16. Did you have any arrangement either directly or indirectly with any one at Hodgenville, or elsewhere, by which you came into possession of the name of said Graham preparatory to this shipment?"

"A. I do not recall any such arrangement."

"Q. 18. Did you receive this name and others to whom you shipped at this place, and which enabled you to open up your trade in this town without previous arrangement on your part or other officers of your firm? If so, tell how you came by them?"

"A. I do not recall."

"Q. 19. Do you know by what method Richard

Graham's name become known to your firm? If so, state in minute detail?"

"A. I do not."

"Q. 20. Was this shipment a mere venture to see what customers would take out the goods?"

"A. This shipment was made on the strength of an order received from Richard Graham."

"Q. 27. Does your firm send agents or salesmen into such local option territory, and did you in this case to collect prospective customers? If you did, who was the agent or salesman in this case, and where is he now?"

"A. I do not recall sending any salesman into that territory."

"Q. 33. Why did you send the package without any advertisement on the outside?"

"A. I don't know that we did."

The alleged order on which Stone claimed to have shipped the whisky to Graham was exhibited without the envelope in which it was sent. It exhibits no post mark, but its language is as follows:

"Order sheet of Old Kentucky Falls Distillery, 322, 323, 326 McFarland street, Cincinnati, Ohio.

"Date March 21, 1905. No. of order 74.

"Ship C. O. D. by Am.....Express charges prepaid.....

.....

Gallons. Quarts. Name of Goods. Price C. O. D.

.....

4 Ky. Falls $380

.....

Name of purchaser, Richard Graham.
Shipment to (Name of town) Hodgenville.
Postoffice, Hodgenville.
County.....State, Kentucky."

Richard Graham was re-called and the second time asked as to his knowledge of the above order, and denied that he had written, signed or seen it, and was equally positive that he had not authorized any one to write, sign or make the order for him. Indeed, he denied on his examination in chief that he had ever heard of the Old Kentucky Falls Distillery Co., or its manager, until he got all the whisky shipped him. He also testified that though he had seen no one taking orders for whisky in Hodgenville before the package in question was received by him, there was a man soliciting such orders just afterwards. Langley, appellant's local agent, admitted that he prepared and placed in the Hodgenville postoffice the postal card notifying Graham of the arrival of the package and requesting him to call and get it. Upon being required to produce in court the book kept in the express office for entering the receipt and delivery of packages, its entries showed that the package shipped to Graham was received at the Hodgenville office April 17, 1905, and delivered to Graham on the 18th, whereas, it was received at the office March 24, 1905. On the 27th of March the notice of its being there was mailed by Langley to Graham, and the latter took it from the office March 29th, 1905. It is patent from the discrepancies referred to that the entries in the book were not made as of the dates respectively on which the whisky was received and delivered.

At the conclusion of the evidence for the Commonwealth, and again after all the evidence was introduced, appellant moved the court to peremptorily instruct the jury to find it not guilty, but both motions were overruled, and the court instructed the jury as follows:

"1. The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, The American Express Co., in the city of Hodgenville, Larue county, Kentucky, within twelve months before the issual of the warrant herein, sold whisky in less quantity than five gallons at one time to Richard Graham, and received from Graham the charge therefor, you should find the defendant guilty as charged in the warrant, and fix its punishment at a fine in any sum not less than $60 nor more than $100, or at confinement in the county jail for any time not less than ten days, nor more than forty days, or at both such fine and imprisonment.

"2. The court further instructs the jury a delivery of said whisky in Hodgenville C. O. D. was a sale, unless said whisky had been ordered by said Graham previously of the consignor, M. E. Stone.

"3. If the jury believe from the evidence that Richard Graham sent to M. E. Stone at Cincinnati, Ohio, a written order to ship to him said whisky at Hodgenville, and that said Stone shipped said whisky to Graham by the American Express Co., and said express company delivered said whisky to Graham and collected the charge therefor, they should find defendant not guilty.

"4. If the jury believe from the evidence that defendant, American Express Co., did not know, nor had reasonable grounds to believe, that the package delivered contained whisky, they should find for defendant.

"5. If they have a reasonable doubt of the defendant having been proved guilty, they should find him not guilty."

It is insisted for appellant that it was error to refuse the peremptory instruction, and more so to instruct the jury as was done by the trial court, and this contention rests upon the theory that the shipment of whisky, on

account of which appellant was found guilty under the warrant, was interstate commerce, and, therefore, can not be regulated or interfered with by a trial and conviction of appellant under the laws of this State as attempted in this case. We can not sustain this contention if, in truth, the transaction here presented was a mere selling of whisky in a local option territory through the instrumentality of the express company.

If there was any evidence in this case that the whisky was not ordered by Graham from the Cincinnati company; that the pretended order therefor upon which his name appears was a forgery, and that the appellant express company knew it was whisky when received and delivered by it, the verdict should be permitted to stand. There was evidence on both sides of these several propositions, but the jury had the right to accept the statements of Graham that he did not know and had never heard of the Cincinnati company before receiving the package in question; that he had never ordered any whisky of them, and had never signed the written order or authorized it to be written or forwarded, as against the statements of Stone, the manager of the Cincinnati shipper, that he had received the order.

In the long and evasive deposition of the latter no fact is stated that conclusively contradicts Graham. Stone was not even acquainted with Graham, and no attempt was made to prove by the latter's neighbors or acquaintances that the order was in his handwriting. Graham can not be prosecuted for receiving and paying for the whisky, his connection with the transaction offered no inducement to him to suppress or misrepresent the facts, nor had he any interest in the result of the prosecution against appellant. But this was not true of the position

occupied by Stone, or appellant's agent, Langley. The jury also had the right to reject the testimony of appellant's agent, Langley, and to conclude that there was enough in the circumstances connected with the shipment of the package to show knowledge on his part or that of appellant's other agents through whose hands it passed, that it contained whisky. For it would do no violence to appellant's rights to presume that it had some knowledge of the business of so valuable a patron as a Cincinnati whisky house, and that in accepting a shipment from such a concern its agents would make some effort to discover what it was. The fact that the box containing the whisky was unmarked by the brand of the shipper or with the name of the place from which it was shipped, and the further fact that in accepting it for shipment appellant assumed responsibility for its safe delivery, and would, therefore, be liable for its value if lost, was sufficient to put them upon inquiry as to its contents. No doubt the jury also attached some significance to the fact that appellant did not give itself the benefit of the testimony of its receiving agent at Cincinnati, or of the messenger who had charge of the package from the time it left Cincinnati until it reached Hodgenville, that they might acquit themselves and it of the imputation of knowledge as to its contents.

It may be said here, as held in Adams Express Co. v. Commonwealth, 92 S. W., 932: "The Commonwealth proved facts which of themselves established the guilt of the defendant company." It showed the existence of the prohibition law in the town of Hodgenville, the delivery of liquor by appellant to Graham, and the payment of the price by the latter to its agent. These facts make a case for the Commonwealth, unless appellant's explanation of

the transaction presented such a defense as took it out of the statute, the burden of showing which was upon it. If the jury were of the opinion that this was not done by the evidence, it had the right to find appellant guilty.

It is argued that though it be conceded that appellant, by its agents, knew the package in question was whisky, as it had the right to assume that it had been ordered by the consignee, and that the shipper, after effecting the sale in Cincinnati, was simply shipping it for delivery in due course, there was nothing in the transaction to warn appellant of its illegality. It does, however, appear from the evidence that Graham failed to call for or inquire about the package until notified of its arrival, which would not have been probable if he had ordered and was expecting it, and that when he went for it he asked appellant's agent whence it came and what it contained, before it was paid for or delivered to him. This was sufficient to indicate to the agent that he had not ordered it, and that the shipment was not a bona fide one.

The case at bar differs from that of Adams Express Co. v. Commonwealth, supra, only in the fact that in the latter the defendants were proved to have made a score or more deliveries of whisky in local option territory upon illegal shipment from Cincinnati, which were held to give it knowledge of the illegality of the system it was instrumental in maintaining, whereas, in the case at bar, there was but the one sale.

We are unable to see that this difference makes appellant less guilty, if in fact it knowingly aided the shipper to violate the law. In Adams Express Co. v. Commonwealth, 27 Ky. Law Rep., 1096, it was held that a conviction of the defendant for one such transaction was proper, it being shown that it knowingly delivered to the

consignee, in a local option district, whisky which he had not ordered, and collected of him the price thereof.

We do not feel at liberty to say that the verdict of the jury is without support from the evidence, and in our view of the law the instructions were proper. If such a transaction as is here presented is permitted it would not only render impossible the enforcement of prohibition in local option districts, but would also, in large measure, place the retailing of spirituous liquors in this State in the hands of irresponsible foreign dealers, who, though not themselves amenable to the jurisdiction and process of the courts of the State, can, through their willing instruments, the express companies, violate its laws with impunity. We can not afford to set in motion such a train of evils.

Judgment affirmed.